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In the Supreme Court of the United States

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the absence of specific statutory authority, federal agencies may require recipients of grant-in-aid funds to repay amounts that have been determined, after an administrative hearing, to have been misspent.

2. If not, whether there is sufficient statutory authority to permit such recoupment of improper expenditures under Title I of the Elementary and Secondary Education Act of 1965.

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COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of T. H. Bell, Secretary of Education, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is reported at 662 F.2d 208. The decisions of the Education Appeal Board (Apps. D and E, *infra*, 31a-87a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 27a-28a) was entered on October 13, 1981, and a petition for rehearing was denied on December 17, 1981 (App. C, *infra*, 29a-30a). On March 8, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to April 16, 1982, and on April 6, 1982, he further extended the time for filing a petition to and including May 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

20 U.S.C. (Supp. IV) 1226a-1 [1] provides:

> Payments pursuant to grants or contracts under any applicable program may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine.

20 U.S.C. (Supp. IV) 1234a provides in pertinent part:

> (a) Final audit determination; written notice to State or local educational agency
>
> Whenever the Secretary determines that an expenditure not allowable under a program listed in section 1232d(a) of this title, or conducted under title VI and title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 1391 et seq., 3221 et seq.] or under the Emergency School Aid Act [20 U.S.C. 3191 et seq.] has been made by a State or by a local educa-

[1] The same provision originally appeared in 20 U.S.C. (1976 ed.) 1232d.

tional agency, or that a State or local educational agency has otherwise failed to discharge its obligation to account for funds under any such program, the Secretary shall give such State or local educational agency written notice of a final audit determination, and he shall at the same time notify such State or agency of its right to have such determination reviewed by the Board.

(b) Application for review; * * *

A State or a local educational agency that has received written notice of a final audit determination and that desires to have such determination reviewed by the Board shall submit to the Board an application for review not later than thirty days after receipt of notification of the final audit determination. * * * Unless the Board determines that a final audit determination lacks sufficient detail, the burden shall be upon the State or local educational agency to demonstrate the allowability of expenditures disallowed in the final audit determination.

(c) Collection of amount owing to await final decision

When a State or a local educational agency has submitted an application for review with respect to a final audit determination, no action shall be taken by the Secretary to collect the amount determined to be owing until the Board has issued a final decision upholding the audit determination as to all or any part of such amount. * * *

(d) Finality

A decision of the Board with respect to an application for review under this section shall be-

come final unless within sixty days following receipt by the State or by the local educational agency of written notice of the decision—

(1) the Secretary for good cause shown, modifies or sets aside the decision, in whole or in part, in which case the decision shall become final sixty days after such action by the Secretary, or

(2) the State or the local educational agency files a petition for judicial review as provided in section 1234d of this title.

(e) Establishment of amount owing

A final audit determination by the Secretary under subsection (a) of this section with respect to which review has not been requested pursuant to subsection (b) of this section, or a final decision of the Board under this section upholding a final audit determination against a State or local educational agency shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with the Federal Claims Collection Act of 1966 [31 U.S.C. 951 et seq.].

* * * * *

(g) Five-year limitation period

No State and no local educational agency shall be liable to refund any amount expended under an applicable program which is determined to be unauthorized by law if that expenditure was made more than five years before that State or local educational agency is given the notice required by subsection (a) of this section.

20 U.S.C. (Supp. IV) 2835 provides:

(a) Auditing

The Office of Inspector General of the Department of Education shall make provision for audits of grants made under this subchapter to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant.

(b) Audit resolution and repayment

The Secretary shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

STATEMENT

1. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. IV) 2701 *et*

seq.[2] was enacted to provide federal funding to expand and improve programs "which contribute particularly to meeting the special educational needs of educationally deprived children" in areas where there are high concentrations of children from low-income families. 20 U.S.C. (Supp. IV) 2701. The Secretary of Education (the Secretary) acting through state educational agencies (SEAs), distributes funds to local educational agencies (LEAs) to provide services to eligible educationally deprived children. The statutory scheme is carefully constructed to ensure that the funds appropriated are actually expended for the benefit of disadvantaged school-children. Only schools, attendance areas and children meeting very specific statutory criteria are entitled to Title I funds (20 U.S.C. (Supp. IV) 2732, 2733, 2736, 2737).

In order to participate in the Title I program, an SEA must submit assurances to the Secretary that the program will be administered in accordance with all applicable statutes and regulations. 20 U.S.C. (Supp. IV) 1232d, 2802. For the LEA to obtain Title I funds, it must submit a written application to its SEA proposing a project to meet the special educational needs of educationally deprived children. 20 U.S.C. (Supp. IV) 1232e, 2731, 2734. The amount of funds that an LEA may receive under Title I is determined by a formula based on the number of children from low-income families in the

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[2] Title I has been repeatedly and extensively revised since its original enactment (App. A, *infra*, 2a n.2). Similar provisions to the ones summarized in this paragraph have been included in the statute since its inception, although only the current citations are provided.

area served by the LEA and the state per pupil expenditure. 20 U.S.C. (Supp. IV) 2711.

Grant payments may be made either in advance or by way of reimbursement. 20 U.S.C. (Supp. IV) 1226a-1, 2841. Department of Education regulations provide four specific methods of payment: "[a]dvance by Treasury check," "[r]eimbursement by Treasury check," percentage of completion method (for construction work), or letter of credit. 34 C.F.R. 74.91, 74.93. The letter of credit is the preferred method of payment. Pursuant thereto the Department authorizes the grantee to draw funds from the Treasury during the fiscal year, generally not less frequently than monthly, based upon grantee projections of the cost of providing the identified services for that period. 34 C.F.R. 74.61(e), 74.92.

Each state must conduct audits to determine whether the federal Title I monies were lawfully and properly applied. 20 U.S.C. (Supp. IV) 2817. In addition, the Secretary may conduct an audit at any time (5 U.S.C. (Supp. IV) App. 378-383; 20 U.S.C. (Supp. IV) 2835).[3] If, as a result of either type of audit, the Secretary determines that grantee fund withdrawals have exceeded the amount to which the grantee was entitled, or that funds have been misspent, a demand is made for restoration. If the grantee is unable or unwilling to pay the debt, the Secretary may offset the amount of the unauthorized payments against current or prospective grant disbursements in order to recoup the excess payments, but only if the offset does not impair the current operation of the program (34 C.F.R. 74.95(a)).

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[3] This authority was originally contained in 20 U.S.C. (1976 ed.) 1232c(a)(2).

2. Respondents, the State of New Jersey and the Commonwealth of Pennsylvania, participate as grantees in the Title I program. In the early 1970's the Department of Health, Education, and Welfare Audit Agency (HEWAA) performed separate audits of their programs for Fiscal Years 1971-1973 (New Jersey) and 1968-1973 (Pennsylvania). In its final audit reports, issued in 1975, HEWAA found that both States had misapplied substantial sums of federal Title I monies during the periods under investigation (C.A. App. 1a (N.J.); C.A. App. 17a (Pa.)).[4] After soliciting responses from the States, the Deputy Commissioner for Elementary and Secondary Education in the Office of Education (now, the Department of Education) issued final determination letters sustaining the audit findings and ordering the States to refund the amounts determined to have been misspent (C.A. App. 44a (N.J.); C.A. App. 81a (Pa.)).

Both States filed applications for review with the Title I Audit Hearing Board (C.A. App. 50a (N.J.); C.A. App. 91a (Pa.)).[5] After hearings, the successor Education Appeal Board in February 1980 concluded that New Jersey "should make * * * payment [totaling $1,031,304] to the U.S. Office of Edu-

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[4] "C.A. App." refers to the separate Appendix for each State filed in the court of appeals.

[5] The Title I Audit Hearing Board was administratively established in 1972 to provide SEAs with an opportunity to appeal audit findings to an impartial administrative tribunal. 37 Fed. Reg. 23002-23003 (1972). Effective June 29, 1979, the Title I Audit Hearing Board was replaced by the statutorily mandated Education Appeal Board and that Board assumed jurisdiction over the appeals filed by New Jersey and Pennsylvania. See 44 Fed. Reg. 30528-30537 (1979), 44 Fed. Reg. 43807 (1979).

cation" (App. D, *infra*, 57a); in May 1980 it similarly concluded that Pennsylvania should submit payment in the amount of $422,424.29 to the Department of Education (App. E, *infra*, 86a). The Secretary declined to review the decisions and accordingly, after the period for comment and review, the Board's decisions became the final decisions of the Department (App. F, *infra*, 88a-91a). Each State was informed that appropriate officials "will be in touch with you at an early date to discuss the method of repayment" (App. F, *infra*, 88a, 90a).[6]

3. Respondents thereupon filed separate petitions for review in the United States Court of Appeals for the Third Circuit contending, *inter alia*, that the Secretary lacked both statutory authority and a common law right to administratively recoup illegally expended pre-1978 Title I funds.

The court of appeals agreed; on the basis of a consolidated decision, it granted the petitions and remanded to the agency with instructions to vacate the orders requiring payment (App. A, *infra*, 1a-26a). First, the court found (App. A, *infra*, 12a-14a) that the Department of Education lacked specific statutory authority to order the repayment of these misspent funds because the only express authorization to recoup was provided in the 1978 amendments to Title I (20 U.S.C. (Supp. IV) 2835(b); see also 20 U.S.C. (Supp. IV) 1234a(e)). Relying on the "overarching principle" of *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981)—that "the terms and conditions of a federal grant must be set forth clearly

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[6] No such discussions have yet taken place. Collection in accordance with the Federal Claims Collection Regulations (4 C.F.R. Part 102) has been postponed pending the outcome of this litigation. See 20 U.S.C. (Supp. IV) 1234a(e).

and unambiguously in the statute authorizing the grant"—the court held that the 1978 statute could not be applied retroactively to funds misspent prior to the effective date thereof (App. A, *infra*, 14a).

Second, although recognizing that the government may resort to the same common law remedies—including setoffs—as private contractors, the court stated (without deciding the issue) that these remedies may not survive where a statutory remedy is provided (App. A, *infra*, 21a). But, the court concluded, even if such a common law remedy survived here, the "advance-funding" method of distributing money "lends itself to enforcement of that right only by an action in a court of competent jurisdiction." (*ibid.*). The court accordingly distinguished this case from *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976), which upheld the common law right of the Department of Health, Education, and Welfare to recover unauthorized Medicare payments by setoff. The court below explained that the use of an "offset" in a reimbursement program such as Medicare would not prejudice the intended beneficiaries of the program, whereas employment of a setoff in an advance-funded program such as Title I would have such an effect and was therefore proscribed (App. A, *infra*, 21a-22a). Thus, the court concluded, agencies administering advance-funded grants cannot administratively enforce a common law right of setoff, even if such a right exists (*id.* at 24a-25a).

REASONS FOR GRANTING THE PETITION

1. The decision below is in direct conflict with the decision of the Fourth Circuit in *State of West Virginia* v. *Secretary of Education*, 667 F.2d 417

(1981), which held that the Secretary has both statutory and common law authority to recover misspent Title I funds on the basis of audits and Board hearings procedurally identical to those involved here, even though the funds were received by the State prior to the effective date of the Education Amendments of 1978 (667 F.2d at 419).[7] There are 27 other Title I cases now pending before the Board, involving audit claims of more than $60 million in funds received by states before the effective date of the 1978 amendments. Extensive proceedings have already been held in a number of these cases; several are awaiting Board decision.[8] Unless the circuit conflict is resolved, and the decision below reversed, the Secretary must either undertake the expensive, time-consuming, and duplicative effort of pursuing these claims in a number of district courts despite the favorable ruling of the Fourth Circuit,[9] or he must face further delays in his attempts to recoup the funds on the basis of the Board hearings, while other states, relying on the decision below, challenge his authority in courts of appeals that have not spoken on the

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[7] On April 26, 1982, this Court denied West Virginia's motion to direct the Clerk of the Court to file an untimely petition for certiorari seeking review of the Fourth Circuit's decision.

[8] The Secretary has recently reached final decisions in two other such Title I audit cases that were before the Board. Under 20 U.S.C. (Supp. IV) 1234d, the States of Kentucky and Oklahoma may appeal these decisions to the United States Courts of Appeals for the Sixth and Tenth Circuits, respectively. Both of these States raised the instant decision as a defense in the administrative proceedings.

[9] Some of the recoupment claims might now be barred by the statute of limitations. Compare 20 U.S.C. (Supp. IV) 1234a(g) with 28 U.S.C. 2415.

issue. Only a prompt decision by this Court can avoid the inevitable expense, delay, and administrative confusion created by this conflict.

2. The disruptive effects of the decision below can be expected to extend beyond Title I. In reaching its decision, the court of appeals focused on the legislative scheme of Title I (App. A, *infra*, 3a-8a) and apparently concluded that the implication of a right to administrative recoupment of funds dispersed before the 1978 amendments became effective was inconsistent with the other enforcement provisions contained in the statute (see, *e.g.*, *id.* at 7a, 20a). But the vast majority of federal statutes providing for advance-funded grants do not specifically authorize administrative recoupment. See R. Cappalli, *Rights and Remedies Under Federal Grants* 98 (1979); 31 C.F.R. 205.4, 205.7. Many of these statutes contain equally detailed enforcement provisions. Moreover, the language of the court's conclusion (App. A, *infra*, 24a-25a) at least suggests that it believed it was establishing a general principle for the interpretation of statutes authorizing federal grants. The decision below thus inevitably casts doubt on the validity of the recoupment procedures of many federal agencies. That doubt in itself threatens those agencies with the same sorts of expenses, delay and confusion now facing the Department of Education.[10]

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[10] Indeed, recipients of grants from other federal agencies have already relied on the decision below in challenging recoupment efforts of those agencies. For example, the Department of Labor has informed us that grantees are relying on the instant decision in challenges to recoupment efforts under the Comprehensive Employment and Training Act of 1973, 29 U.S.C. 801 *et seq.*, and the Environmental Protection Agency reports similar problems.

The court of appeals' decision thus undercuts the effectiveness of a principal method of controlling unauthorized expenditures under the approximately one thousand federal assistance programs funded primarily through grants, and jeopardizes efforts by the federal government to recover millions of dollars used under grant statutes in ways that do not further the purposes for which those statutes were enacted. In sum, while this Court has "long recognized that Congress may fix the terms on which it shall disburse federal money to the States" (*Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981); see also *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Oklahoma* v. *U.S. Civil Service Commission*, 330 U.S. 127, 143 (1947)), the decision below seriously weakens the federal government's ability to enforce those terms.

The enforcement problem is a serious one. In fiscal year 1981 alone, federal grants-in-aid to state and local governments exceeded $95 billion; as of June 30, 1981, at least $374 million of audit-related debts were outstanding. Comptroller General, *Federal Agencies Negligent in Collecting Debts Arising From Audits* 2, 6 (1982) ("GAO Report"). Both Congress and the President have recently expressed concern about deficiencies in agency efforts to collect these audit disallowances. GAO Report; United States Executive Office of the President, Office of Management and Budget, *Major Themes and Additional Budget Details, Fiscal Year 1983*, 279-283. Contrary to the suggestion of the court of appeals (App. A, *infra*, 23a), the right to "maintain[] a civil action in a court of competent jurisdiction" is not an adequate alternative.[11] The sheer volume of

[11] Of course, to the extent that the court below suggested that no common law right to recover the misapplied sums

such suits would, as a practical matter, seriously strain both judicial and administrative resources, and the large sums of money involved often would encourage grant recipients to resist repayment, thereby postponing the need to repay the sums in dispute. Moreover, administrative agencies or independent administrative boards such as the Education Appeal Board, which have special expertise in the area involved, are better suited to resolve the issues likely to arise in challenges to audit claims.

3. These severe adverse effects are the result of the court of appeals' misinterpretation of controlling legal principles.

This Court has established that the federal government has inherent authority to recover funds illegally paid. See, *e.g.*, *United States* v. *Carr*, 132 U.S. 644 (1890); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190 (1896). This right may be exercised by appropriate and reasonable means, including deducting or withholding the amount of the overpayment from other sums due to the recipient. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240 (1947); *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336 (1841); *McKnight* v. *United States*, 98 U.S. 179, 186 (1878); *Wisconsin Central R.R.* v. *United States*, *supra*. The right of recoupment is independent of statute. See *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Grand Trunk Western Ry.* v. *United States*, 252 U.S. 112, 121

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exists even in a judicial proceeding (App. A, *infra*, 23a), the problem would be exacerbated. For example, if the Secretary cannot even recover misspent pre-1978 Title I funds by instituting an action in federal court, the federal government would have no recourse once it determines that a state has misspent the funds, regardless of how egregiously the conditions of the grant have been violated.

(1920); *United States* v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841). It is abrogated only where Congress has clearly manifested its intention to do so. *United States* v. *Wurts*, *supra*, 303 U.S. at 416. Nowhere in Title I or elsewhere is there any explicit pronouncement of congressional intent to raise a statutory barrier to recoupment;[12] hence, the United States clearly retains its common law right of recoupment to recover misspent funds.[13]

Other courts of appeals have consistently affirmed the common law right of an agency to recoup administratively without resort to court action. See, *e.g.*, *Collins* v. *Donovan*, 661 F.2d 705, 708 (8th Cir. 1981); *Jacquet* v. *Westerfield*, 569 F.2d 1339, 1342 (5th Cir. 1978); *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Cf. *Burlington Northern, Inc.* v. *United*

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[12] Instead, the 1974 enactment of a statute of limitations for the recovery of audit claims (20 U.S.C. (1976 ed.) 884), and the legislative history of Title I both indicate that Congress has always expected the Secretary to recover Title I funds administratively determined to have been misused. See S. Rep. No. 91-634, 91st Cong., 2d Sess. 83-84 (1970); H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 78-79 (1974).

[13] The court below suggested that the common law right may have been abrogated because Title I expressly authorizes the agency to withhold funds and disapprove grant applications. App. A, *infra*, 20a, 23a. The fact that a statute provides for one remedy falls far short of constituting the required explicit pronouncement of congressional intent to repeal the recoupment remedy. *United States* v. *Wurts*, *supra*. In providing explicit statutory recoupment authority in the 1978 amendments, Congress simply provided a procedural framework for the administrative enforcement of rights otherwise implicitly held.

States, 462 F.2d 526, 529 (Ct. Cl. 1972); *Lodge 2424, International Association of Machinists & Aerospace Workers* v. *United States*, 564 F.2d 66, 71 (Ct. Cl. 1977); *Transwestern Pipeline Co.* v. *United States*, 639 F.2d 679, 687 (Ct. Cl. 1980). The court below incorrectly distinguished cases such as *Mt. Sinai Hospital* v. *Weinberger*, *supra*, on the ground that they involved reimbursement funding. The court believed that, in such circumstances, recovery of unauthorized payments by offset would not injure the intended beneficiaries of the federal programs (*e.g.*, Medicare) involved, whereas an offset in the advance-funded Title I programs would injure the disadvantaged children that are its intended beneficiaries (App. A, *infra*, 21a-22a). But recoupment authority should not turn on the Secretary's choice among alternative available funding methods (20 U.S.C. (Supp. IV) 1226a-1); 20 U.S.C. (1976 ed.) 1232d). In any event, the distinction between "advance" and "reimbursement" funding is not significant. Actual payments under both Medicare and Title I, for example, are disbursed in similar fashion—at periodic intervals, generally monthly, throughout the fiscal year—and payments may be withheld at any time during the year for good cause. See page 7, *supra*; *Mt. Sinai Hospital* v. *Weinberger*, *supra*, 517 F.2d at 335.

Moreover, contrary to the decision below, Title I programs would not be impaired by a properly effectuated offset.[14] Department regulations prohibit the collection of a debt by reduction of future payments if the reduction would impair the accomplish-

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[14] Nor is it clear that Medicare beneficiaries would continue to receive treatment to the same extent if an offset were implemented. See *Mt. Sinai Hospital* v. *Weinberger*, 376 F. Supp. 1099, 1104 (S.D. Fla. 1974).

ment of the objectives of the grant program (34 C.F.R. 74.95(a)). Instead, debtor states must be required to replenish offset funds out of state and local funds, or out of federal funds for which there is no accountability to the federal government. Payment may be made by check or by offset procedures requiring the grantee to agree to perform fully the grant despite reduced Title I payments. See 34 C.F.R. 74.95(a); 45 Fed. Reg. 21303-21306 (1980); GAO Report, *supra*, at 26-28. Furthermore, since the amount of a state's misspent funds is generally small compared to a state's Title I allocation, and Title I is financed entirely by federal funds, there is virtually no risk of total program frustration through grantee withdrawal. Indeed, although the Department of Education's authority to recoup has been undisputed since enactment of the 1978 amendments, no state has elected to withdraw from the program, nor have the program's goals been impaired in any way.

While impact on program goals and beneficiaries is a valid consideration in determining the method of repayment, such determination rests within the broad discretion of the agency, subject to judicial review for arbitrariness. The Secretary has not yet had the opportunity to exercise that discretion here. As the notice letter to each State indicated (App. F, *infra*, 88a, 90a), the "method of repayment of the funds in question" remains to be determined after judicial review is completed and the amount of the State's liability established. At this stage of the proceedings, therefore, it was inappropriate for the court to assume that the Secretary will select a collection method that is inconsistent with the statutory purposes.

Finally, even if express statutory authority for administrative recoupment is necessary, Title I has contained such authority since the 1978 amendments, substantially before the completion of the Board proceedings involved here.[15] Contrary to the conclusion of the court of appeals, reliance on the authority contained in the 1978 amendments (20 U.S.C. (Supp. IV) 2835, 1234a(e)) does not involve an unfair retroactive application of the law. Compare *State of West Virginia* v. *Secretary of Education*, *supra*, 667 F.2d at 419. It is well established that the federal courts and administrative agencies should apply the law in existence at the time of decision unless doing so would result in manifest injustice. See *Gulf Offshore Co.* v. *Mobil Oil Corp.*, No. 80-590 (July 1, 1981) slip op. 12 n.16; *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). States do not have a vested right to any particular procedure for litigating Title I audit claims, and they certainly did not have a vested right to misspend Title I funds. Recoupment by administrative en-

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[15] See also 31 U.S.C. 952(a), the Federal Claims Collection Act of 1966, which requires the head of each federal agency to "attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency." Pursuant thereto, government-wide regulations promulgated jointly by the Attorney General and the Comptroller General (4 C.F.R. Parts 101-105 (1980)) obligate the head of each agency to take "aggressive" and "timely" action to collect debts, including making "written demands * * * upon a debtor" and instituting an "offset * * * in every instance in which this is feasible," so long as the claims are certain in amount. See 4 C.F.R. 102.1, 102.2, 102.3.

forcement, subject to judicial review, would not work a manifest injustice.[16]

Nothing in this Court's decision in *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981), suggests otherwise. Although the Court there emphasized that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" (*id.* at 17), the Secretary here is simply attempting to recover funds spent in violation of unambiguously expressed conditions. There is no attempt to saddle the states with financial obligations that they could not have anticipated when they accepted the grants. All that is at issue is their obligation to account to the Secretary for the expenditure of the funds pursuant to the conditions to which they agreed, and when it has been administratively determined that they cannot do so, to repay the funds to which they were not entitled. Imposing such an obligation on the states is hardly unfair to them; to the contrary, permitting the states to retain the large sums of misspent funds is unfair to the intended beneficiaries of the federal funds and to the taxpayers whose monies have been diverted from their intended purposes.

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[16] Even assuming that reliance on 20 U.S.C. (Supp. IV) 2835 to recoup previously misspent funds involved a retroactive application of that section, it is generally recognized that "statutory changes that are procedural or remedial in nature apply retroactively." *United States* v. *Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); see *Koger* v. *Ball*, 497 F.2d 702, 706 (4th Cir. 1974); *United States* v. *Haughton*, 413 F.2d 736, 738 (9th Cir. 1969).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1991
No. 80-2302

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
PETITIONER IN No. 80-1991

v.

SHIRLEY HUFSTEDLER,
SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
RESPONDENT IN No. 80-1991

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER IN No. 80-2302

v.

SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
RESPONDENT IN No. 80-2302

PETITIONS FOR REVIEW OF DECISIONS OF THE UNITED STATES DEPARTMENT OF EDUCATION

Argued May 18, 1981

Before ADAMS, ROSENN, and HIGGINBOTHAM,
Circuit Judges

(Opinion Filed October 13, 1981)

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

These petitions for review of final decisions of the United States Department of Education ("Department" or "Agency")[1] present important questions of first impression in this court. The decisions under review are orders directing petitioners New Jersey and Pennsylvania ("States") to refund to the Department federal funds distributed to the States under the provisions of Title I of the Elementary and Secondary Education Act of 1965 as amended[2]

[1] The Department of Education was created by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3508 (Supp. III 1979)) and is the successor agency to the former Office of Education ("OE") in the Department of Health, Education and Welfare ("HEW"). The transfer of functions authorized by the act occurred on May 4, 1980, at the direction of the President. Exec. Order No. 12,212, 3 C.F.R. 255 (1981), *reprinted in* [1980] U.S. Code Cong. & Ad. News 7826. Only the very last stages of the adminsitrative proceedings in the cases before us took place after the transfer of functions. However, for purposes of clarity, the former designations of "Office of Education" and "Commissioner of Education" will be used in this opinion only when precision is necessary, otherwise being subsumed in the references to the "Department of Education" and the "Secretary of Education."

[2] Pub. L. No. 89-10, 79 Stat. 27, *amended by* Pub. L. No. 89-750, 80 Stat. 1191 (1966); Pub. L. No. 90-247, 81 Stat. 783 (1967); Pub. L. No. 91-230, 84 Stat. 121 (1969, *enacted* 1970); Pub. L. No. 92-318, 86 Stat. 235 (1972); Pub. L. No. 93-380, 88 Stat. 484 (1974); Pub. L. No. 94-482, 90 Stat. 2081 (1976); Pub. L. No. 95-112, 91 Stat. 911 (1977); Pub. L. No. 95-561, 92 Stat. 2143 (1978); *and* Pub. L. No. 96-46, 93 Stat. 338 (1979). The various pieces of amending legislation will be referred to by the date contained in their short titles—*e.g.*, 1969 Amendments. Footnote references to public law number and session law citation will be provided as appropriate.

("ESEA") and determined by the Agency audits to have been misapplied under the terms of that Act and its implementing rules and regulations.[3] The States have refused to comply with the Department's directives because they contend that the Agency is without authority under the Act to recover through administrative proceedings Title I funds that were misspent during the years in question.[4] Additionally, New Jersey challenges the correctness of the Agency's audit findings; Pennsylvania challenges the Department's interpretation and application of the Act's statute of limitations and claims that its rulemaking procedures are deficient. We reach only the question of the Agency's claimed authority to issue the orders presently before us and conclude that such authority does not exist. We therefore reverse.

I.

In 1965, as his education program was nearing floor debate in the Senate, President Johnson, com-

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[3] 45 C.F.R. pts. 116 & 116a (1980) (to be transferred to 34 C.F.R. pts. 200 & 201 (1981)). In addition to these codified regulations the Agency implements the Act in several less formal manners. For example, the Agency has established mandatory criteria in its program guidelines, which are distributed to nonfederal agencies preparing applications for participation in Title I. The Agency also distributes program manuals to participating entities and will often issue letter memoranda in response to inquiries of local or state educational agencies. *See generally* The National Institute of Education, DHEW, *Administration of Compensatory Education* 5-7 (Report to Congress 1977).

[4] New Jersey's Title I program was audited for the period September 1, 1970 through August 31, 1973. The Department's assessment against Pennsylvania stems from an audit report of that state's program from July 1, 1967 through June 30, 1973.

menting on the bill that was to become the Elementary and Secondary Education Act of 1965, said: "This bill has a simple purpose: To improve the education of young Americans."[5] Beginning with the ESEA, legislation passed in pursuit of that laudable objective fundamentally altered the federal government's remote role in education. The Senate committee report on ESEA notes this change in direction by quoting Senator Taft's statement expressing Congressional concerns prompting the legislation:

> "Education is primarily a State function, but in the field of education, as in the fields of health, relief, and medical care, the Federal Government has a secondary obligation to see that there is a basic floor under those essential services for all adults and children in the United States."

S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1450. According to educational statistics then before the Congress, the nation had almost fallen below the "basic floor" referred to by Senator Taft and this encouraged federal intervention.[6]

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[5] S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong., & Ad. News 1448.

[6] According to the Senate report,

> The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rates of our 18- to 24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical edu-

Without doubt, the provisions of ESEA Title I effectuated one of the most ambitious federal forays into the educational domain. Confronted with overwhelming evidence of a direct link between economic privation and educational underachievement, Congress authorized a massive [7] infusion of federal funds into the nation's public school systems for the improvement of the educational lot of children from low-income families. In Title I, however, Congress has done more than simply "throw money at a problem." The statutory scheme has been carefully constructed to ensure that the funds appropriated for the benefit of disadvantaged schoolchildren are actually applied and distributed in the most equitable and efficient manner.

For example, the amount of a grant to a particular local educational agency ("LEA") is determined by direct reference to the number of children from low-income families eligible to attend the schools served by the LEA. Pub. L. No. 874, tit. II, § 203, *as added by* Pub. L. No. 89-10, tit. I, § 2, 79 Stat. 27, 28 (1965) (*codified as amended at* 20 U.S.C. § 2711 (Supp.III 1979)). Federal funds are to be distributed only after the state educational agency

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cators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy.

S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1449.

[7] In Title I's first year, Congress appropriated $775,000,000 to the program. Departments of Labor, and Health, Education, and Welfare Supplemental Appropriation Act, 1966, Pub. L. No. 89-199, ch. II, 79 Stat. 831, 832 (1965). By 1979, funding levels had reached $3,077,132,000. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, tit. II, 92 Stat. 1567, 1577 (1978).

("SEA") to which the particular LEA is responsible has provided assurances that the LEA, under the SEA's direction, will expend the federal monies only on "programs and projects . . . (A) which are designed to meet the special education needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs . . . ." Pub. L. No. 874, tit. II, § 205, *as added by* Pub. L. No. 89-10, tit. 1, § 2, 79 Stat. 27, 30 (1965) (*codified as amended at* 20 U.S.C. § 2734 (Supp.III 1979)).

The federal program prohibits the use of funds to supplant an existing state-funded compensatory education program, requires LEA's to maintain their existing commitment in the area as a condition to continued eligibility, and prescribes that only the excess costs incurred as a result of instituting Title I programs shall be paid with Title I funds. 20 U.S.C. § 2736 (Supp.II 1979). The Act also establishes very definite criteria to be used in identifying the schools and attendance areas in which Title I funds may be expended, 20 U.S.C. § 2732 (Supp.III 1979), as well as the children that may be served. 20 U.S.C. § 2733 (Supp. III 1979). As might be expected, the specificity and complexity of the statutory restrictions on the use of Title I funds are modest when compared with the intricate set of rules and regulations adopted by the administering federal agency. *See* 45 C.F.R. pts. 116 & 116a (1980) *and* note 3 *supra*.

Although this overview of the program might suggest a rigid and pervasive federal presence at all levels of Title I administration, in keeping with traditional governmental roles in education, Congress actually entrusted most of the responsibility for man-

agement to the SEA's and the primary responsibility for innovative program development to the LEA's. Basically, the Act contemplates that each LEA that desires to receive Title I funds will file an application detailing its needs, its eligibility, and the intended uses for the requested funds. This application is submitted to the SEA, which verifies its accuracy and ensures that all proposals conform with current Title I guidelines. The SEA after collecting all LEA applications from its jurisdiction, then submits its own application to the Department for the aggregate sum to which its LEA's are eligible (according to their applications), plus an amount for administration expenses. This application is accompanied by assurances from the SEA that the funds will be used only for lawful Title I purposes.

The resolution of the questions presented by this case therefore is of considerable importance in administering the Title I program. Congress chose to rely heavily on the States to assure proper application of Title I funds, but committed to the Department the authority to adopt such rules and regulations as it deemed appropriate. Such a division of responsibility must inevitably lead to conflicts between the SEA's and the Department over the proper application of Title I funds. When conflicts have developed, the Department has resorted to a variety of procedures, all directly related to its power over the purse strings, to enforce its interpretation of the Act against the States. Some, such as withholding funds or refusing to approve applications, find their roots in the clear and unambiguous terms of the statute in effect when the deposited funds were received. Pub. L. No. 874, tit. II, §§ 206, 210, *as added by* Pub. L. No. 89-10, tit. I, § 2, 79 Stat. 31, 33 (1965) (*codified as amended at* 20 U.S.C. §§ 2832,

2836 (Supp. III 1979)). In this case, however, the Department adopted procedures for the Pennsylvania and New Jersey audit proceedings not clearly authorized by the statute under which the funds were disbursed. It is this variance in procedure that is the genesis of this litigation.

A.

To understand fully the issue we decide today, a brief examination of the administrative proceedings that have brought these cases to us is necessary. The Department, in carrying out its statutory responsibilities, performed separate audits of the Pennsylvania and New Jersey Title I programs. The initial audits were performed by auditors employed by the Department of Health, Education and Welfare Audit Agency ("HEWAA"). In its final audit reports, issued in April (Pennsylvania) and June (New Jersey) of 1975, HEWAA found that both States had misapplied substantial sums of federal Title I monies during the periods under investigation. These reports were forwarded to the Deputy Commissioner for Elementary and Secondary Education, who solicited responses from the States. On May 18, 1976, the Deputy Commissioner issued a final audit determination letter on the Pennsylvania audit. In his letter addressed to the SEA, the Deputy Commissioner sustained the audit findings that $1,346,399.00 had been misspent in Pennsylvania during the audit period and ordered the State to refund that sum to the Department. He sent a similar final audit determination letter to the New Jersey SEA on June 11, 1976, and demanded a refund of $1,161,917.00.

Upon receipt of the Deputy Commissioner's final audit determination letters, both States filed applications for review with the Title I Audit Hearing

Board.[8] Panels of that Board held hearings[9] on the State's objections and, in written decisions dated February 19, 1980, (New Jersey) and May 7, 1980, (Pennsylvania), modified the Deputy Commissioner's findings and assessed audit deficiencies of $1,031,304[10]

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[8] The Department's briefs to this court explain that "[a]lthough under no legal requirement to do so, OE created the Board to give [SEA's] a fair opportunity to rebut adverse final audit determinations of the Deputy Commissioner before an independent administrative tribunal."

[9] On June 29, 1979, the Education Appeal Board ("EAB" or "Board"), created by Pub. L. No. 95-561, tit. XII, § 1232, 92 Stat. 2347 (1978) (*codified at* 20 U.S.C. § 1234 (Supp. III 1979)) assumed jurisdiction of all cases then pending before the Title I Audit Hearing Board. 44 Fed. Reg. 43807 (July 26, 1979). However, the transfer of functions caused few practical disruptions because the composition of the EAB was identical to that of the Title I Audit Hearing Board. Pennsylvania, however, claims to have suffered from the transfer because the notice of the establishment of the EAB, given May 25, 1979, 44 Fed. Reg. 30528, which included rules governing procedures before the EAB indicated that the procedures were in effect immediately. Thus, Pennsylvania claims, and the Department does not deny, that the State was forced to try the portion of its case heard after May 25, 1979, under new and unfamiliar rules. Pennsylvania also asserts that the Department's final regulations governing the EAB, substantially identical to the interim final regulations under which post-May 25 hearings were held, were disapproved by Congress pursuant to 20 U.S.C. § 1232(d) (1976 & Supp. III 1979).

[10] This reduction resulted from the application of a five-year statute of limitations enacted in 1974. Pub. L. No. 93-380, tit. I, § 106, 88 Stat. 484, 512, *originally codified at* 20 U.S.C. § 884 (1976), *renumbered and replaced*, Pub. L. No. 95-561, §§ 801(2), 901(b), 93 Stat. 2284, 2305 (1978), *as amended by* Pub. L. No. 96-46, §§ [1](20), 2(a)(3), 93 Stat. 339-40 (1979). *Cf.* Pub. L. No. 90-247, tit. IV, § 452(g), *as added by* Pub. L. No. 95-561, § 1232, 92 Stat. 2347-49 (1978) (pre-

against New Jersey and of $422,424.29 [11] against Pennsylvania. The Board's decisions were subject to a comment period during which they were forwarded to the Secretary, who declined to review them. The Board's decision as to New Jersey became the final decision of the Department on May 2, 1980; the decision as to Pennsylvania became final on July 16, 1980. Timely petitions for review were filed in this court.[12]

As explained earlier, both Pennsylvania and New Jersey contend that, to the extent the above-described procedures directed the payment of a refund by the SEA's, the procedures were outside the Department's statutory authority. The Department responds by citing two statutory provisions that it urges explicitly authorize the procedures followed in these cases. Alternatively, the Department relies on a common-law right of the Government to recoup grant funds expended in violation of the terms and conditions of the grant. We turn first to the statute.

B.

The Government's dilemma lies not in the unreasonableness of its demands for the return of the

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scribing a five-year statute of limitations for refund proceedings effected under the General Education Provisions Act).

[11] This reduction resulted from an application of the statute of limitations, *see* note 10 *supra* and from a determination that funds had not been misspent in one of the five LEAs that were the subject of HEWAA audit deficiencies.

[12] Jurisdiction of this court is proper under either 20 U.S.C. § 2851 (Supp. III 1979) (authorizing appeals from adverse final action of the Secretary regarding Title I audits) or 20 U.S.C. § 1234d (Supp. III 197?) (authorizing appeals from adverse final action of the EAB).

misspent monies but in the absence of a statutory remedy to compel repayment. The Department first invokes a recent addition to the statutory scheme as authority for its actions in these cases. Title I's section 185 (20 U.S.C. § 2835 (Supp. III 1979)) was added by the 1978 Amendments,[13] which effectively rewrote the entire Act. Section 185 directs that when Title I audits disclose a misapplication of grant funds, the Secretary shall take steps to "assure timely

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[13] Pub. L. No. 95-561, tit. I, § 101, 92 Stat. 2143, 2190 (1978), *adding* Pub. L. No. 89-10, tit. I, § 185. The section reads:

> § 2835. Audits and audit resolution
>
> (a) Auditing.—The Inspector General of the Department of Health, Education and Welfare shall make provision for audits of grants made under this subchapter to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and the terms and conditions of the grant or subgrant.
>
> (b) Audit resolution and repayment.—The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Commissioner shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

and appropriate resolution of audit findings and recommendations." This audit resolution process is expressly directed to include repayment of funds "finally determined . . . to have been misspent or misapplied." Pointing out that Section 185, and complementary sections contained in the General Education Provisions Act ("GEPA"),[14] were in effect when final agency action was taken in the cases at bar, the Department claims that the decisions under review simply fulfill the statutory obligations of the Agency to ensure the fiscal integrity of Title I at the state and local level.

The States counter the Department's Section 185 argument by invoking the general rule against retroactive application of statutory enactments:

> "[T]he first rule of construction is that legislation must be considered as addressed to the future, not the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

Greene v. *United States*, 376 U.S. 149, 160 (1964) (quoting *Union Pacific Railroad* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). *See United States* v. *Richardson*, 512 F.2d 105, 106 (3d Cir. 1975).

The States further assert that retroactive enforcement of a newly created governmental right of recovery is especially inappropriate in the context of participatory grant programs involving sovereign States. It is, the States contend, in the nature of

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[14] *See* 20 U.S.C. § 1234, 1234a (Supp. III 1979).

a grant program that a prospective grantee may exercise its prerogative not to participate. However, it is argued, for that prerogative to be exercised knowledgeably and, presumably in the case of governmental entities, in the public interest, it is necessary that the prospective grantee be able to assess the potential risks and benefits that would flow from participation. For this court, it is urged, to enforce retroactively a sanction not mentioned when the grantees entered into the program, would impose serious hardship on States operating under budgetary limitations and would result in a dramatic and undesirable reduction in the participation rates for worthy federal grant programs such as Title I.

The States' arguments are persuasive and in harmony with the views recently expressed by the Supreme Court in *Pennhurst State School and Hospital* v. *Halderman*, 49 U.S.L.W. 4363 (U.S. April 20, 1981). In *Pennhurst*, the Court reversed this court's holding that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-81 (1976 & Supp. III 1979) ("DDA"), imposed affirmative obligations on the states to provide mentally retarded persons with appropriate treatment in the environment that would be least restrictive of their personal liberty. *Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 94, 107 (3d Cir. 1979) (*en banc*). Referring to Congressional authority to legislate pursuant to the Spending Power,[15] the Court stated: "[O]ur cases have long recognized that Congress may

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[15] The Spending Power is derived from Congress' authority to provide for the general welfare. U.S. Const. art. I, § 8, cl. 1. Department counsel agreed at oral argument that Title I was enacted in exercise of this power.

fix the terms on which it shall disburse federal money to the States." 49 U.S.L.W. at 4367. The *Pennhurst* Court then proceeded to describe Spending Power legislation as

> much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a state is unaware of the condition . . . . [I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id.

We recognize that *Pennhurst* is not directly applicable to the cases before us. That case concerned the imposition of affirmative obligations, the costs of which were not fully covered by grant funds. Nevertheless, the overarching principle of *Pennhurst*—that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant—precludes us from giving retroactive effect to a statute passed five years after the last disputed funds were received. Such a result would require repayment of misspent funds out of a state's general treasury. Section 185 does not confer authority on the Department to impose the sanctions it adopted in these cases.

The Department also relies on Section 415 of the General Education Provisions Act ("GEPA"),[16] currently codified at 20 U.S.C. § 1226a-1 (Supp. III 1979), for authority to recoup misspent Title I funds. That section provides:

> Payments pursuant to grants or contracts under any applicable program may be made in reimbursement with necessary adjustments on account of overpayments or underpayments as the Commissioner may determine.

We are at somewhat of a loss to understand the Department's arguments concerning the operative effect of Section 415. The section is entitled "Payments" and purports to prescribe the manner in which federal funds are paid *to the States*. Therefore, it is clear that whatever "adjustments" are authorized under this provision, they are to be accomplished by means of an offset against current or prospective grant fund disbursements to SEA's. The Department's actions in the cases at bar are very much different and it cannot, therefore, invoke the authority of Section 415.

In fairness to the Department, it should be noted that its arguments respecting Section 415 rely heavily on certain statements in the Senate Report on the 1969 Amendments (which first enacted GEPA Section 415 as Section 425), which seem to indicate a much broader remedial power than we have recognized. *See* S. Rep.. No. 91-634, 91st Cong., 2d Sess.

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[16] Pub. L. No. 90-247, tit. IV, § 425, *as added by* Pub. L. No. 91-230, tit. IV § 401(a)(10), 84 Stat. 170 (1970), *renumbered*, Pub. L. No. 92-318, tit. III, § 301(a)(1), 86 Stat. 326 (1972), *renumbered* Pub. L. No. 95-561, tit. XII, § 1231(a)(1), 92 Stat. 2342 (1978).

83-84, *reprinted at* [1970] U.S. Code Cong. & Ad News 2826.[17] A close reading of the report, however, reveals that the language on which the Department relies, printed under a heading of "REPORTS AND AUDITS," was in fact explanatory of Section 424 of the bill, and that the reference to Section 425 was a typographical error. The committee's remarks concerning Section 425 (now Section 415) are in the immediately preceding paragraph of the report.[18]

Section 424, to which the legislative history quoted in note 17 in fact refers, required grant recipients to maintain appropriate records of Title I expenditures and programs and gave Department officials and mem-

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[17] The Department quoted to the court the following passage from the report:

> The language of section 425 is based on a recommendation of the Comptroller General respecting retention of records and audits relating to education programs.
>
> Audit reports on title I of the Elementary and Secondary Act have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer.

[18] That paragraph reads:

> GENERAL PROVISIONS
>
> Sections 422, 423, and 425 are general provisions concerning the prohibition of Federal control of education, labor standards, and methods of payment. These three sections are a substitute for the numerous similar provisions scattered throughout present law and obviate the necessity of including similar provisions in any further legislation.

bers of the Comptroller General's staff full access to those records "for the purpose of audit and examination." Although not pressed upon the court, we assume the argument that Section 424, in providing the authority to conduct audits, also authorizes the resolution of audit determinations and that the strong legislative history of the section indicates an intent to utilize refunds as a means of resolution. Such an argument is not unreasonable; in the circumstances of this statutory scheme, however, it is unavailable.

As we alluded to earlier, Title I was a fundamental departure from the traditional federal role in education. Public Law 874, which served as the foundation on which the 1965 ESEA was built, limited federal aid to areas directly affected by local federal activity, especially that activity related to the war effort. *See* S. Rep. No. 2458, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 4014. We think it likely, in light of the historic underpinnings and the experimental nature of Title I, that Congress desired to receive accurate and reliable information on the program's strengths and weaknesses. That such information was earnestly sought and utilized is reflected by the number and breadth of the ESEA amendments. *See* note 2 *supra*. Despite the committee's acknowledgment that audit reports had been forthcoming in the past, we believe that Section 424 was enacted as a means of assuring the continued flow of information to the Department and Congress.

We find support for our conclusion in the 1978 Amendments to the Act which, although they augmented the Act with Section 185 and its GEPA counterpart Section 452,[19] both of which explicitly author-

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[19] Pub. L. No. 90-247, tit. IV, § 452, *as added by* Pub. L. No. 95-561, tit. XII, § 1232, 92 Stat. 2347 (1978) (*codified at* 20 U.S.C. § 1234a (Supp. III 1979)).

ize the Secretary to demand and collect refunds of misspent monies, left in place Section 424 (*codified as amended at* 20 U.S.C. § 1232f (Supp. III 1979)), without significant amendment. Were we to read Section 424 as authorizing the procedures used and the orders issued in the instant cases, not only would we be ascribing to Congress a useless act in enacting Section 185, but we would be construing the Act to contain plain redundancies. Neither course is appropriate.

The Department has been very thorough in marshalling its arguments before this court. Barely a line of legislative history supporting the existence of recoupment authority during the time these funds were received has escaped attention in its oral argument or brief. The States also have made extensive efforts to support their position in the reports and discussion of Congressional committees and members. The parties' assiduousness, however, has failed to provide the requisite legislative history which compels either interpretation of the statute. In view of this void, we look to the terms of the statute itself for the clarity of expression demanded of Congress when States are asked to put at risk substantial rights and benefits in exchange for their participation in a federal grant program. We have studied this statute carefully; we have also closely reviewed the Department's regulations. We cannot say with the necessary firmness of belief that prior to 1978 Congress conferred upon the Department the authority it here asserts against the States. We are constrained, therefore, to deny the statutory power of the Agency to order repayment of the misspent or misapplied funds.

C.

As an alternative source of authority, the Department invokes the common-law right of the Government to recover money and property distributed contrary to law or under a mistake of fact. *See Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151 (1956); *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-40 (1947); *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190, 206, 211 (1896). Arguing that federal agencies are free—perhaps obligated—to avail themselves of this remedy to recover misspent funds, the Department cites to *United States* v. *Marion County School District*, 625 F.2d 607 (5th Cir. 1980); *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975); and *Utah State Board of Vocational Education* v. *United States*, 287 F.2d 713 (10th Cir. 1961).

Although not willing to concede that a common-law right of recovery exists in the circumstances of these cases, the States argue that even assuming the Department could pursue such a remedy for Title I violations, it would have to do so by instituting an appropriate action in a court of competent jurisdiction. Because all proceedings leading up to the decisions presently under review were conducted at the administrative level, the States contend that those decisions, insofar as they require a refund of misspent monies, are a nullity. In support of their arguments, they cite *School Board* v. *Department of Health, Education and Welfare*, 525 F.2d 900 (5th Cir. 1976).

As evidenced by the citation of authority *supra* at 16-17, there can be no debate concerning the right of the Government "to make contracts and hold and dispose of property, and, for the protection of its prop-

erty rights, . . . resort to the same remedies as a private person." *Rex Trailer Co.* v. *United States*, 350 U.S. at 151. However, where a legislative body provides for liability coupled with a special statutory remedy, "that remedy, and that alone, must be employed." *Pollard* v. *Bailey*, 87 U.S. 520, 527 (1874). *See also National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy . . ., courts should not expand the coverage of the statute to subsume other remedies."). The States have presented a strong argument that by providing for the withholding of funds and disapproval of SEA applications, Congress intended to abrogate whatever common-law causes of action the Department may have had to redress noncompliance with the federal Title I scheme. The Department makes an at least equally persuasive argument, grounded in legislative history [20] and an analysis of the operation of the statutory remedies [21] that Congress did not intend that the Department be without a remedy to recover misspent funds. Therefore, it is argued, if the statute does not provide such authority, Congress must have in-

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[20] The Department especially relies on the enactment, in 1974, of a statute of limitations for recovery of misspent funds. *See* note 10 *supra*.

[21] Withholding and disapproval of applications, it is contended, are effective only to correct current violations of Title I. Once the SEA brings its program into compliance, the withholding must terminate and the application must be approved. Without the availability of a common-law right of recovery, the Agency argues, it is powerless to correct past violations of Title I.

tended to leave the common-law remedies intact. In the circumstances of these cases, we need not now decide whether a common-law right of recovery survived enactment of the ESEA because if such a remedy does exist, the method of distributing Title I monies lends itself to enforcement of that right only by an action in a court of competent jurisdiction.

Of the case relied on by the Department, only *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975) involved a wholly administrative utilization of a common-law right of recovery. In *Mt. Sinai*, HEW withheld funds owing to the hospital for past services rendered to Medicare patients. HEW's action was prompted by the agency's determination that, on other occasions in the past, the hospital had rendered services that were not medically necessary but had nevertheless been paid for with Medicare funds. The hospital brought court action seeking an injunction directing the agency to release the funds and to pay them over to the hospital. The district court granted the injunction, holding that HEW's common-law right of recoupment had been abrogated by enactment of the comprehensive Medicare statute. The Fifth Circuit reversed on the abrogation issue.

The remedy of setoff which HEW sought to employ in *Mt. Sinai*, however, is inappropriate in these cases because of fundamental differences between the funding scheme employed by HEW in *Mt. Sinai* and the scheme under Title I. Medicare funds are distributed to participating health care providers by way of reimbursement for services already rendered. Thus, if HHS [formerly HEW] utilizes its common-law right of setoff, which is available to anyone holding funds owing to another from whom a debt is owing, Medicare beneficiaries still receive treatment, but the Government need not pay for those services outside the

program's coverage. The same remedy was used in *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190 (1896), dealing with recovery of illegally disbursed payments for mail carriage by a land grant railroad, and *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), concerning the offset of "cover costs" resulting from the breach of a government construction contract against an amount owing the defaulting contractor from the completion of other contracts.[22] In contrast, the Department uses an advance-funding method of distributing Title I funds, presumably because school districts are unable to function on an anticipated revenue basis. For the Department to attempt to use an offset remedy, therefore, would result in the failure of the school districts to provide Title I services during the year for which funding was withheld. This is obviously unsatisfactory as it defeats Congressional objectives and it means that the intended beneficiaries of the Act—underprivileged school-children—not only suffer when the funds are misapplied but also when the Department attempts to remedy the misapplication.

The Department has not referred us to any case in which a governmental right of recovery was administratively exercised by a means other than setoff and sustained by a court that had analyzed the issue.[23]

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[22] *See also* Lodge 2424, Int'l Ass'n of Mach. & Aerospace Workers v. United States, 564 F.2d 66 (Ct. Cl. 1977).

[23] The Department's reference to West Virginia v. Commissioner of Education, No. 79-1338 (4th Cir. 1980) (unpublished per curiam) is not helpful, even though that case dealt with an order of the Department resulting from procedures similar to those employed here. The court's opinion fails to reveal that the arguments considered in this opinion were pressed and, in such absence, we will not assume that the Fourth Circuit ruled on the issue that presently confronts us.

We have found only one such case, *Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F.Supp. 353 (D.Colo. 1971), and the peculiar facts of that case, coupled with the court's use of equitable estoppel, *id.* at 359, render the case inapposite to the one at bar. Further, the law announced in the case militates strongly against upholding the Department: "[A] legislative tribunal cannot exercise common law or equity jurisdiction unless this authority is expressly granted by the Congress." *Id.* at 359. *See also School District* v. *Department of Health, Education, and Welfare*, 525 F.2d 900 (5th Cir. 1976) (HEW hearing examiner had authority only to determine eligibility of grant recipient, not to order refund or funds dispersed to ineligible grantees).

In the absence of any authority to the contrary, we conclude that the Department, if it retains a common law right to recover misspent Title I funds, may exercise that right only by maintaining a civil action in a court of competent jurisdiction. We note that such a rule assures that the parties to the audit are able to press their arguments concerning the merits of the audit in a judicial forum, either in the Agency-initiated proceedings or in an action seeking to have the Agency remit withheld funds. The Department itself argues to this court that such an opportunity was unavailable to audited parties prior to enactment of the 1978 Amendments. Because neither of the allowable courses were followed in these cases, we may not sustain the orders directing the States to repay the funds determined to have been misspent.

II.

Our decision in these troublesome cases is reached only after carefully weighing the effect it may have

upon a valuable national educational program. Title I is an important cornerstone in the federal aid to education program and, by most accounts, it is proving reasonably successful in securing the advantages of education for the seriously disadvantaged. Misapplication of funds, even though it occurs in a good-faith effort to comply with complex regulatory requirements, detracts from the effectiveness of the program as a whole. It cannot be condoned or dismissed lightly. Administrative agencies, however, are purely creatures of statute, and their authority is statutorily circumscribed. To allow an agency to assume powers that it considers appropriate in carrying out its duties but which have not been allotted to it by Congress would attribute legislative powers to the executive branch and disturb the balance in our tripartite system of government. More important, perhaps, would be the absence of due process in a system where agencies charged with administering the multitude of federal grant programs were free to augment or abridge the rights and obligations forming the contractual basis of the grantees' participation. Title I participants who have received funds after the effective date of the 1978 Amendments have been advised by Congress that they will be held responsible in administrative proceedings with a right of judicial review for Title I funds that are misapplied. Requiring less is simply inconsistent with our concept of fairness.

We therefore hold that an administrative agency has no authority to order repayments of funds misapplied or misspent by federal grant participants unless Congress, at the time the funds are received, has declared its intention to empower the agency to exercise such a remedy. In the absence of Congres-

sional authority, the remedy exists, if at all, only at common law. We further hold that if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common-law right to recover misspent funds, it may do so only by maintaining a civil action in a court of complete jurisdiction.

Accordingly, the petitions for review will be granted and the orders of the Department will be reversed and the cases remanded with instructions to vacate the orders requiring a repayment by petitioners of previously received Title I funds.[24]

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[24] Because we do not reach the issue of the regularity of the proceedings at the agency level, the Department's motion to strike the affidavit of William M. Dallam, appended to petitioner Pennsylvania's reply brief, will be granted.

A. LEON HIGGINBOTHAM, *Circuit Judge*, Concurring.

I concur in the holding of the court, specifically, that the Department was not empowered by statute to order the states to repay the amounts that were determined to have been misspent.

I cannot agree that the issue of what common law remedies the Department may have had is properly before us, because it is clear that no such remedies were exercised by the Department in these cases. I therefore believe that the court's discussion of the scope of the Department's setoff remedy is dictum.

With that understanding, I concur.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1991

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, PETITIONER

v.

SHIRLEY HUFSTEDLER, SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, RESPONDENT

No. 80-2302

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, RESPONDENT

ON PETITIONS FOR REVIEW OF DECISIONS OF THE UNITED STATES DEPARTMENT OF EDUCATION

Present: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

These causes came on to be heard on the records from the United States Department of Education and were argued by counsel on May 18, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review be and the same are hereby granted and the orders of the said Department dated May 7, 1980, and appealed at No. 80-1991, and July 16, 1980 and appealed at No. 80-2302, be, and the same are hereby reversed and the causes remanded for vacation of the orders requiring repayment by petitioners of previously received Title I funds, in accordance with the opinion of this Court. Costs taxed against respondent.

ATTEST:

Clerk

/s/ Sally Mrvos

October 13, 1981

Certified as a true copy and issued in lieu of a formal mandate on December 28, 1981.

Test:

/s/ Sally Mrvos
Clerk

United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 80-1991 & 80-2302

No. 80-1991

STATE OF NEW JERSEY, DEPT. OF EDUCATION, PETITIONER

v.

SHIRLEY HUFSTEDLER, ETC.

No. 80-2302

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

SECRETARY OF EDUCATION, ETC.

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Respondent in the above entitled case having been submitted to the judges who participated in the decision of this court

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied

By the Court,

/s/ Arlin M. Adams
Circuit Judge

Dated: December 17, 1981

APPENDIX D

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

EDUCATION APPEAL BOARD

Docket No. 14-(29)-76

Appeal of

THE STATE OF NEW JERSEY
TITLE I, ESEA

DECISION

Appearances: Mark Schorr, and Jane Sommer for the State of New Jersey; Philip H. Rosenfelt and Robert Arnot for the Deputy Commissioner of Elementary and Secondary Education.

I. *Preliminary Statement*

On June 11, 1976 the Deputy Commissioner for the Bureau of Elementary and Secondary Education, Department of Health, Education and Welfare ("Deputy Commissioner") issued a final determination letter to the New Jersey State Department of Education ("New Jersey" or "New Jersey SEA") demanding a refund in the amount of $1,161,917 to satisfy certain claimed deficiencies relating to expenditures by New Jersey through its Newark Local Education Agency ("Newark" or "Newark LEA") of Title I funds during the school years 1970-71 and 1971-72.

The Deputy Commissioner's claimed refunds are based on the H.E.W. audit agency's findings of June 20, 1975, which are summarized in Enclosure No. 1 to the Deputy Commissioner's letter of June 11, 1976, as follows:

a. $91,266 in Title I funds were improperly spent during the 1970-71 school year at the Lafayette

School, which was found to be ineligible for such funds on the basis of the low-income percentage shown on the face of Newark's application to the New Jersey SEA.

b. $41,102 in Title I funds were improperly spent during the 1970-71 school year at 10 Newark schools because these schools were not listed in the LEA's application as eligible for Title I funds.

> (By reason of the application of the federal statute of limitations, 20 U.S.C. § 884 (Supp. IV 1974), it has been stipulated that all but $1,674 have been eliminated from the above two claims. Attempts at settlement failed; and the parties have requested the panel to determine whether the Deputy Commissioner is entitled to the reduced claim for $1,674.)

c. $1,029,630 in Title I funds were improperly spent during the 1971-72 school year because the method used by the Newark LEA to determine the eligibility of attendance areas deviated from the applicable Title I regulations, and particularly § 116.17 (d) thereof. Ten elementary schools and three secondary schools were found to have been ineligible.

On May 12, 1977, the undersigned Panel of the Education Appeal Board (formerly the Audit Hearing Board) met to consider New Jersey's appeal at a pre-hearing conference. The points agreed on at this conference were summarized in a pre-hearing conference statement issued by the Panel on June 29, 1977. Pursuant to the schedule adopted by the Panel at that pre-hearing conference, counsel then exchanged written interrogatories and responses were made.

On September 2, 1977, New Jersey filed a motion to compel answers to certain of its interrogatories to

which the Deputy Commissioner had objected and the Deputy Commissioner responded to this motion.

The Panel considered the papers submitted and by a memorandum opinion and order dated February 10, 1978, held that it does not have authority to compel discovery, including answers to interrogatories, and that the Panel's role is limited to encouraging the parties to undertake voluntary discovery.

The Panel went on to advise the parties with respect to whether several of the New Jersey interrogatoreis objected to by the Deputy Commissioner could, in the Panel's opinion, be answered and to what extent. This, however, was simply informal advice to counsel for the parties.

On March 31, 1978, counsel for both parties filed a joint pre-hearing memorandum, together with New Jersey's statement of factual and legal contentions and the Deputy Commissioner's statement of the issues presented and his position thereon. In their joint pre-hearing memorandum, counsel for the parties indicated that neither party requested an evidentiary hearing at that time, *i.e.*, March 1978.

On April 17, 1978, the Panel adopted the briefing schedule that had been jointly proposed by both parties. The following briefs were filed on the in-indicated dates:

a. On June 2, 1978, New Jersey filed its main brief together with an affidavit of Bernard J. Brandwene and an appendix and certain exhibits.

b. On August 4, 1978, the Deputy Commissioner filed its main brief, together with certain exhibits, including Exhibit F, the affidavit of Alan Bergman.

c. On September 11, 1978, New Jersey filed a letter reply brief, and on November 9, 1978, New Jersey filed a supplemental affidavit of Bernard J. Brandwene.

d. On September 12, 1978, New Jersey filed a motion to suppress the affidavit of Alan Bergman and the Deputy Commissioner responded.

e. On January 9, 1979, the Deputy Commissioner filed a supplemental affidavit of Alan Bergman.

f. On January 10, 1979, the Deputy Commissioner filed comments concerning the supplemental affidavit of Mr. Brandwene.

The Panel considered New Jersey's September 12, 1978 motion to suppress and by memorandum order dated March 8, 1979, denied it. At the same time, it noted that neither party had requested an evidentiary hearing and certain other matters. In its memorandum the Panel requested that counsel for the parties address the following principal issues at oral argument:

> (1) Whether the Commissioner of Education is without jurisdiction to compel New Jersey to refund the Title I monies allegedly improperly spent.
>
> (2) Whether the New Jersey SEA, in approving the Newark LEA's 1971-72 Title I project application, failed to comply with the then prevailing regulations establishing project eligibility.
>
> (3) Whether New Jersey's recalculation of low income percentages made after the acceptance of the project application by the SEA and approval of the Office of Education of the grant award are relevant to this appeal.

(4) If so, whether the method used by New Jersey in making its recalculation meets the then applicable Office of Education regulations and program criteria for Title I program awards.

(5) If so, whether such calculation supports New Jersey's contention that the grant was properly made and no refund is required.

(6) Assuming that the answer to any of the foregoing three questions is in the negative, is there any other ground whereby the grant award to the Newark LEA may be supported, including possible designation of the Newark LEA as a district-wide Title I target area?

With respect to all but the second issue, the parties stipulated that the issues have been joind. With respect to the second issue, the New Jersey SEA does not contend that Newark's LEA-71-72 Title I application complied with the then prevailing regulations establishing project eligibility.

Counsel for the parties ably and thoroughly addressed the principal issues at an oral argument on June 21, 1979. At this argument the Panel rejected counsel for New Jersey's request to introduce a further supplemental affidavit of Bernard Brandwene, an accountant for New Jersey, in view of the lateness of the offer and New Jersey's prior agreement to waive an evidentiary hearing. We will now consider the various issues.

II. *Findings of Fact and Conclusions*

A. *Deputy Commissioner's reduced claim for $1,674 refund for the 1970-71 school year.*

As noted above, the parties have stipulated that all but $1,674 of claim "a" ($91,266) and claim "b"

($41,102) have been eliminated by application of 20 U.S.C. § 884 (Supp. IV 1974), the federal statute of limitations. At oral argument counsel for New Jersey submitted the question of its obligation to refund the $1,674 on the bases of points 1 and 4 of its principal brief, filed June 2, 1978, and counsel for the Deputy Commissioner submitted on the basis of Appendix A to its principal brief filed August 4, 1978, which addresses points 1 and 4 above. Point 1, which challenges the Commissioner's authority to require SEA's to refund Title I funds determined to have been improperly spent, is resolved against New Jersey in Part B, below. Point 4, which contends that Newark could have been declared a district-wide Title I target area during the 1971-72 school year, is not relevant to the audit findings relating to the 1970-71 year because New Jersey does not include any evidence concerning the variance in low-income percentages in Newark during the latter year. Nor do we see how such a conclusion can be deduced from the evidence relating to the 1971-72 year with regard to Newark's being a district-wide target area, which we in fact reject below. (See *infra* paragraph G.) Hence, the Deputy Commissioner's reduced claim for the $1,674 refund is sustained.

B. *Whether the Commissioner of Education is without jurisdiction to compel New Jersey to refund Title I monies allegedly improperly spent.*

New Jersey claims that the Commissioner is without authority to seek refund of monies allegedly misspent under the Title I grant from the U.S. Office of Education. In principal support of this claim, New Jersey asserts that the Commissioner's remedies under Title I are limited to his power to withhold

funds prospectively (20 U.S.C. 241j). The cited statute provides that, whenever the Commissioner finds a failure to comply substantially with any assurance contained in an SEA's application, he may notify the SEA that further payments will be withheld until he is satisfied that there is no longer any such failure to comply. New Jersey argues that an administrative agency must keep within the powers expressly conferred by law, that its jurisdictional grant should be strictly construed, and that the power to demand refunds cannot be implied from the purpose of the basic legislation, which is to pay-over monies to SEAs to meet the special educational needs of educationally deprived children. New Jersey further argues that the Congress knows how to grant express administrative powers to recoup allegedly misspent funds as, for example, in 20 U.S.C. § 631, dealing with construction of urgently needed school facilities in federally impacted areas. Further, New Jersey cites Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(b)) which provides that "a sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." Thus, New Jersey concludes that because no authority is expressly set out in the enabling statute and none can reasonably be attributed to any conceivable educational purpose, the authority does not exist and the Commissioner is without jurisdiction to require a refund.

The Deputy Commissioner, in response, finds statutory authority for refund proceedings in Section 435 of the General Education Provisions Act, 20 U.S.C. § 1232d, which authorizes the Commissioner to make "adjustments on account of overpayments or underpayments as the Commissioner may determine." In

response to New Jersey's assertion that nothing in the legislative history of Title I suggests that the Commissioner has the power to compel refunds, the Deputy Commissioner cites the Senate report accompanying Section 435, which notes that in prior years audit exceptions had been taken to certain Title I expenditures and that "they appear to be well founded," and "must be enforced if the Congress is to carry out its responsibility to the taxpayers." Sen. Rep. No. 91-634, 91st Cong. 2d Sess. 83-84 (1970). The Deputy Commissioner also finds Congressional intent in the five-year statute of limitation provision enacted in 1974 (20 U.S.C. § 884), in that there would have been no purpose in limiting recoupment to a five-year period prior to receipt by the SEA of final written notice that certain payments were unauthorized if in fact there were no authority in the Office of Education to recoup those payments during the five-year period. The Deputy Commissioner also argues that the Commissioner has a common law right to recoup allegedly misspent monies.

The Panel has given careful consideration to the pros and cons of this basic jurisdictional challenge. We believe that the issue may not have been free from doubt prior to the time that Congress enacted the 1974 statute of limitations. But by that action Congress must have recognized the Commissioner's authority to recoup when it decided to put a time limitation on that very authority. While this is not an express delegation of jurisdiction, it comes close enough, in our view, to satisfy APA Section 9(b). It also indicates a legislative intent expressed with respect to Title I programs which precedes the Deputy Commissioner's final determination letter of June 11, 1976. This issue has been considered and similarly resolved in the Com-

missioner's favor by at least three other panels,* and may ultimately be raised and determined in an appropriate judicial forum. For these reasons, we conclude that the Commissioner is not limited to withholding of future funds but may recover funds improperly spent within the applicable limitation period.

C. *Whether the New Jersey SEA, in approving the Newark LEA's 1971-72 Title I project application, failed to comply with the then prevailing regulations establishing project eligibility.*

As noted above, the New Jersey SEA admits it did not meet the Title I requirements for determining the eligibility of school attendance areas for Title I funding when it approved Newark LEA's 1971-72 project application with respect to 13 Newark schools. Under Section 142(a) of Title I of the basic statute (20 U.S.C. §241f(a)), a state desiring to participate in the Title I program must give an assurance to the Office of Education ("OE") that it will only approve LEA projects which meet Title I requirements and that it will enforce all obligations imposed on LEAs under 45 C.F.R. § 116 et seq. The New Jersey SEA gave OE such an assurance.

1. *The basic eligibility standards for Title I grants.*

The basic eligibility standard for Title I grants to LEAs at the time in issue (20 U.S.C. § 241e(a)(1)) was that payments under the Title be used for proj-

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* *Appeal of the State of New Mexico*, Docket No. 5-(20)-76 (Decision, August 17, 1979); *Appeal of the State of Pennsylvania* Docket No. 10-(25)-76 (Ruling on Prehearing Motion, May 9, 1978), *Appeal of the State of Texas*, Docket No. 7-(9)-74 (Decision, May 10, 1976).

ects designed to meet the special educational needs of educationally deprived children in "school attendance areas having high concentration of children from low-income families." Implementing this provision, § 116.17(d) of the Title I regulations (45 C.F.R. 116.17 (d)) interpreted the quoted statutory language as including: (1) attendance areas in which the number of children from low-income families is as large as, or larger than, the average number of such children in the various attendance areas of the school district; and (2) attendance areas in which the percentage of children from low-income families is as large as, or larger than, the percentage of such children in the school district. Section 116.17(d) also permitted an entire school district to be designated as eligible but only when there was no wide variance in the number or percentage of children from low-income families. For convenience, a copy of § 116.17(d) is attached to this Decision.

In addition, OE published Program Guide No. 44 (issued March 18, 1968) which provided additional instructions for selecting eligible attendance areas. In brief, the Guide provided that for each "attendance area" data must be obtained on (a) the total number of children who, according to their ages, are *eligible* to attend the public school serving that area and (b) the number of such children who are from low income families. Further, it provided that in all cases the number of children considered *eligible* to attend a particular school consists of all children of the appropriate ages, including children attending private schools and children who have dropped out of school.

In addition, the Guide suggested a number of sources of data to determine the number of children from low income families, and primarily two sources:

1. the number of children in families receiving Aid to Families with Dependent Children ("AFDC"), and
2. the number of children receiving free lunches.

It further indicated that housing, health or employment statistics could also be used but that whatever data were used had to be used uniformly throughout the applicant's school district.

Finally, the Program Guide provided a special method for ranking of attendance areas where the schools do not have well defined attendance area boundaries.

2. *The Newark LEA's method of computing low-income percentages listed on its 1971-72 Title I project application admittedly violated the requisite eligibility requirements.*

In determining the eligibility of attendance areas for the 1971-72 school year, the Newark LEA stated in its Title I application that it had relied on one source, the AFDC statistics supplied by the Essex County Welfare Board. Using this source, and employing the following ratio it arrived at a district-wide low-income ratio of 33.9% (32,352 AFDC children divided by the total school age children population of 95,780).

$$\frac{\text{Total Number of Children from AFDC Families in All Attendance Areas}}{\text{Total Number of Children Considered Eligible to Attend Public Schools Serving All Attendance Areas}} = \text{Percentage of Children from Low-Income Families}$$

This method complied with 45 C.F.R. 116.17(d).

Next, under § 116.17(d), the eligibility of a school attendance area is dependent on the relationship between (a) the total number of children *eligible to attend the public school* serving the attendance area, including those attending private schools and those

who had dropped out of school and (b) the number of such children from low-income families. For individual school attendance areas (and as a corollary to the method the LEA used to compute the district-wide low-income percentage) this relationship can be expressed as the following ratio:

$$\frac{\text{Total Number of Children from Low-Income Families in the School Attendance Area}}{\text{Total Number of Children Considered Eligible to Attend the School}} = \text{Percentage of Children from Low-Income Families in the School Attendance Area}$$

However, the Newark LEA did not use this ratio to compute the low-income percentage for the individual school attendance areas. Because of the incompleteness of the available AFDC statistics (which omitted children attending private and special education schools), the LEA decided to use an alternative ratio permitted by Program Guide 44 under certain conditions. The Guide recognized that in those instances where schools may not have ". . . well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designated for those schools . . .," it may be necessary to use a different ratio, which bases the ranking of the attendance areas for such schools on the ". . . percentage or number of children actually enrolled in [rather than eligible to attend] these schools. This ratio can be expressed as follows:

$$\frac{\text{Total Number of Children from Low-Income Families Enrolled in a Specific School}}{\text{Total Enrollment in a Specific School}} = \text{Percentage of Children from Low-Income Families Enrolled in the Specific School}$$

Although the above ratio was not applicable to Newark, which had well-defined attendance areas, the

HEW auditors recognized that Newark had used it because the incompleteness of the AFDC statistics left no other reasonable approach and acknowledged that it was "a reasonable alternative under the circumstances." But the auditors went on to state that, instead of following the above alternative ratio, the Newark LEA:

> . . . devised hybrid ratios which deviated from the method specified in the program guide. The results were unacceptable since there were no direct relationships between the component elements. For each public elementary school, [Newark] included in the numerator the number of [AFDC] children enrolled in that school as well as the total number of [AFDC] children residing in the school attendance area who were enrolled in junior and senior high schools. However, [Newark] limited the data in the denominator to the total enrollment of the elementary school. There was therefore no meaningful relationship between the data shown in the ratio, namely the total [AFDC] statistics for the attendance area and the elementary school enrollment. Lacking this correlation, the ratio had basic mathematical flaws which tended to inflate the low-income percentage for individual elementary school areas and thus to increase improperly the number of eligible attendance areas.

(Final Audit Report, pages 10-11; Tab C, pages 10-11)

Thus, while the Newark LEA used the proper *denominator* (total enrollment in a particular school), it also, as it has admitted, improperly inflated the *numerator* by including not only the AFDC children

who were enrolled in the particular elementary school but also AFDC children residing in that school's attendance area who were enrolled in junior and senior high schools.

Correctly recalculating the low-income percentages for each of the 41 elementary schools presented as eligible in Newark's Title I application on the basis of the above alternative method, the auditors found that 10 of the 41 schools had low-income percentages that were lower than the district-wide average of 33.9 percent. Thus, these ten schools were ineligible for Title I funding. The Panel accepts the auditors' findings, which are consistent with the underlying evidence.

Similarly, the auditors found that Newark had used a different (and also incorrect) method to compute the low-income percentages for the junior and senior high schools. This method involved, as New Jersey has acknowledged, the LEA computing the low-income percentages for junior and senior high schools by averaging the low-income percentages of the "feeder or pipe-line" elementary schools. New Jersey has also recognized that it approved the LEA's 1971-72 Title I project application despite the fact the application contained these errors. In its initial brief, (p. 19) New Jersey acknowledges that

> The flaw in the initial formula was that it tended to inflate low-income percentages in attendance areas in that its numerator consisted of all low-income students in an area while its denominator described only elementary school enrollment.

On the basis of this admitted "flaw" in the formula used, three of the junior/senior high schools were found to be ineligible for Title I funds during the 1971-72 project year.

D. *Whether New Jersey's recalculation of low income percentages made after the acceptance of the project application by the SEA and approval by the Office of Education of the grant award are relevant to this appeal.*

It is New Jersey's position that the recalculations submitted in the affidavit and first supplemental affidavit of Bernard Brandwene, an accountant, support its contention that the grant was properly made and no refund is required, with the exception of the Garfield School and the Hawkins School ($18,779), which New Jersey concedes remain ineligible even under Mr. Brandwene's recalculations. New Jersey further recognizes that "these calculations are in fact an acknowledgment of the fact that there were irregularities in the original grant approval process," Transcript of Oral Argument, June 21, 1979, (p. 26). The Deputy Commissioner contends the three secondary schools (Clinton Place, Weequahic and East Side), for which $157,878 of Title I funds were spent, and for which New Jersey has provided no recalculations should also be excepted. Thus, even if the Panel were to accept the recalculations, $342,657 in Title I funds may have been improperly allocated.

Putting to one side the merits of the recalculations, the threshold question is whether they are relevant to this appeal.

New Jersey advances what is essentially an equitable argument: in justifying what it has done, a state should be able to rely on any evidence relevant to the Board's primary mission, which is to determine whether the Title I funds were used in schools which, in fact, met the eligibility requirements of the federal regulations, and thus met the special educational needs of educationally deprived children, the underlying

policy of Title I. New Jersey refers to the decision of another panel which admitted "substantially similar *ex post facto* evidence" as instructive. *Appeal of California*, Docket No. 4-(15)-75 (Decision, July 6, 1977). In that case, the original application of a California School District for a Title I program clearly indicated on its face that one of the elementary schools to be included was not eligible: *i.e.*, that the application met neither of the 45 CFR § 116.17(d) requirements, since both the *percentage* and the *absolute* number of children from low-income families in the school were *below* the district-wide average. During the appeal, California submitted supplementary evidence to the panel which indicated that the original application was erroneous and that the school was in fact eligible to participate in the District's Title I program. The panel recognized that the situation confronted it with a difficult choice. On the one hand, the District's application was clearly defective, the SEA had incorrectly approved it, and no steps were taken to correct the error until after the project year was completed; the state had also failed to follow the obvious and clearly defined federal regulations in the application approval process and therefore it was apparent that the relevant portion of the Title I award should be refunded to the Federal Government. On the other hand, since the school was in fact eligible to receive Title I funds, no misuse of the funds was really involved. "With some misgivings," the panel decided no refund should be required for the following reasons: (1) the panel recognized that for the goals of this major federal grant program to be reached, it was necessary that specified procedures be followed and explicit information supplied; (2) occasional failures to do so, which could be described as

"unavoidable human error," were to be expected; (3) if such errors occurred regularly, they became a pattern of conduct which could be viewed as "administrative negligence"; (4) such a pattern could jeopardize the very legislative purpose of this multi-billion dollar federal education program; (5) here, since the panel was confronted with one isolated case, it could not conclude that serious "administrative negligence" existed with respect to the state's review of school district applications generally. Accordingly, the California panel concluded that the mistake involved was a technical one, the result of an isolated human error, and that no repayment should be required.

In this case, the Deputy Commissioner counters New Jersey's argument with several points. Perhaps the most persuasive is that if the Panel is to accept after-the-fact documentation and recalculations, the review function could be rendered meaningless; it would in effect convert the Panel into an auditor, which is not its designated function; further, the HEW auditors could not conduct an effective audit if the grantees were permitted, years after the funds had been spent, to use new methods for computing attendance area eligibility. The Deputy Commissioner also seeks to distinguish the California appeal by pointing out that it involved only one (not thirteen as is the case here) school in the district in question, and that it involved only a computational error, not the use of an improper eligibility formula that inflated the low-income percentages for all school attendance areas in the entire school district.

We do not accept the Deputy Commissioner's basic position that under *no circumstances* should a panel consider after-the-fact evidence. The California appeal is a case in point: a single instance involving a

technical (in this case, computational) error. We are not, however, convinced that the New Jersey multi-school situation fits within the California rationale. However, in view of the conclusions we reach below regarding the merits of New Jersey's recalculations, we need not reach the question of their relevance to this appeal.

E. *Assuming New Jersey's post-hoc recalculations are relevant to this appeal, does the method used by New Jersey in making its recalculations meet the then applicable Office of Education regulations and program criteria for Title I program awards?*

New Jersey contends that its recalculations of low-income percentages for the ten elementary schools in question used the method suggested in Program Guide #44:

> "The flaw in the initial formula was that it tended to inflate low-income percentages in attendance areas in that its numerator consisted of all low-income students in an area while its denominator described only elementary school enrollment. In contrast, the ratio used for the recalculations had a numerator comprised of all low-income children from the area while the denominator was made up of *all* children from the attendance area enrolled in elementary, junior high, *and* senior high schools." New Jersey's Initial Brief, pp. 19-20.

In making its recalculations, New Jersey claims to have relied on the following paragraphs of the Program Guide:

"Some schools have no well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designated for these schools. It may be necessary to base the ranking of the attendance areas for such schools on the percentage or number of children from low-income families actually *enrolled* in those schools while recognizing that other children, as explained below, will be included in the 'target population' if the area is found to have higher than average concentration of children from low-income families."

"The purpose of the attendance area requirement is to identify the 'target populations' of children who are to be considered for participation in Title I activities on the basis of educational deficiency and need for special services. Thus, *for schools without well-defined boundaries or where children have been transferring in or out on open enrollment or freedom-of-choice plans, the* 'target population' should include (a) all of the children who are attending the particular public school which on the basis of enrollment has a high concentration of children from low-income families; (b) children who have been attending that school; and (c) children who would be attending that school if they were not attending a private school or another public school under a freedom-of-choice, open enrollment, or another plan designed to bring about desegreation." (Sa 43) (emphasis added)

Based on its interpretation of the above paragraphs, New Jersey considered data based on the *total* number of children eligible to attend the public schools serving

the various attendance areas and the *total* number of low-income children from the respective areas.

New Jersey's reliance on the above paragraphs appears misplaced. As discussed above, the Program Guide includes an alternative method for ranking attendance areas where the schools do not have well-defined attendance boundaries. Although, in the opinion of the HEW auditors, the Newark LEA had well-defined attendance boundaries, they still found it appropriate for New Jersey to use the alternative method of ranking. But, as the Panel reads the above paragraphs, the Guide's intent was that under the alternative method schools were to be ranked on the basis of the percentages of low-income children enrolled in each particular school.

As previously stated, the alternative method in the program guide can be stated:

$$\frac{\text{Total Number of Children from Low-Income Families Enrolled in a Special School}}{\text{Total Enrollment in a Specific School}} = \text{Percentage of Children from Low-Income Families}$$

In its original calculation New Jersey had included in the numerator not only the number of AFDC children enrolled in that particular school but also the total number of AFDC children residing in that school's attendance area enrolled in junior and senior high schools.

In its recalculatins of low-income percentages, instead of correcting the numerator to include only those children from AFDC families enrolled in a particular elementary school, New Jersey has added an improper denominator to the LEA's previous improper numerator, *i.e.*, both the numerator and the denominator incorrectly included children enrolled in junior and senior high schools. This "aggregate enrollment" does not appear to be authorized by either 45 CFR 116.17(d) or Program Guide #44.

As stated in the affidavit of Alan Bergman, an HEW auditor, the second "hybrid" ratio had the following inflationary effect:

> The method used by the SEA to recalculate eligibility (combining enrollment data from junior and senior high schools with enrollment data from the individual elementary school) had the effect of inflating the low-income percentages for all but one of the individual elementary schools in question. The SEA's method had this effect because the junior and senior high schools had higher percentages of low-income enrollment than the elementary schools, as shown below:

Percentage of low-income enrollment for the ten elementary schools in question	23.8*

* These low-income percentages were calculated by dividing the total AFDC enrollment (for each category of schools) by the total enrollment in that category. The statistics used in making these calculations were taken from the LEA's 1971-72 project application and the listing of AFDC enrollment statistics that was furnished to the LEA by the Essex County Welfare Board (a copy of this AFDC listing is attached as Exhibit A).

Percentage of low-income enrollment for the junior high schools included in the SEA's recalculations	50.9
Percentage of low-income enrollment for the senior high schools included in the SEA's recalculations	35.2

> By including the junior and senior high school enrollment data (which had higher concentrations of low-income students) the recalculated elementary school percentages were inflated as shown below:

Elementary School	The 1971-72 low-income enrollment percentage for the individual school attendance area based on the AFDC and enrollment statistics and as computed by the HEWAA auditor	The 1971-72 low-income enrollment percentage for the school attendance as recomputed by New Jersey SEA
Madison	28.8	39.7
Newton St.	31.5	42.8
So. 17th St.	33.5	40.3
Central Ave.	29.4	41.4
Burnet St.	30.2	39.0
Waverly Ave.	31.9	37.2
Franklin	32.4	34.8
M. Garvey	22.9	36.1
Garfield	20.6	26.0
Hawkins	30.3	25.9

In summary, in combining enrollment data from junior and senior high school with enrollment data from individual elementary schools New Jersey employed an impermissible method. By building the junior and senior high school enrollments, which had higher concentrations of low-income students, into the ratio, New Jersey inflated the elementary school low-income percentages so that eight of the ten originally disqualified schools became qualified. New Jersey's method of recalculation is unacceptable.

F. Assuming New Jersey's post-hoc recalculations are relevant to this appeal, do such recalculations support New Jersey's contention that the grant was properly made and no refund is required?

Based on the foregoing analysis, the Panel's answer to this question must be "no."

G. *Assuming that the answer to any of the foregoing three questions is in the negative, is there any other ground whereby the grant award to the Newark LEA may be supported, including possible designation of the Newark LEA as a district-wide Title I target area?*

New Jersey contends that "under regulations applicable in 1971 and consistent with the clearly expressed intent of Congress, the whole of the Newark school district could have been considered educationally disadvantaged so as to be a Title I area." Initial Br. p. 22, see pp. 22-28.

At the time of the Newark's submission of its 1971-72 application, 45 CFR § 116.17(d) provided in part:

> . . . In certain cases, the whole of a school district may be regarded as an area having a high concentration of [*children from low-income families*] and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

Newark did not apply under the above "no wide variance" rule to have the New Jersey SEA declare the entire Newark school district eligible for Title I services. Nor did New Jersey, when it approved Newark's 1971-72 application, determine that Newark qualified as a "no wide variance" district.

Nonetheless, New Jersey now contends, for the first time, that the Newark LEA was in fact so qualified. New Jersey first points to certain legislative history, relevant to Title I of the ESEA of 1965 and in particular to a 1965 Senate Committee Report which stated, inter alia: "There may be circumstances where a school system is basically a low-income area and the

best approach in meeting the needs of educationally deprived children would be to upgrade the regular program." Senate Rep. No. 146, 89th Cong., 1st Sess., reprinted in [1965] U.S. Code Cong. & News 1454. New Jersey next refers to a 1966 House Labor and Education Committee Report reaffirming this position:

> *"We specifically pointed that there may be circumstances where a whole school system is basically a low-income area and in which the best approach might be to upgrade the whole school system.* The first year programs involving a general upgrading of whole school systems were discouraged by the Office of Education. The construction of facilities to house Title I programs was permitted only sparingly. This restricted approach was necessitated by limited funds. In the next two years, especially in fiscal year 1968, more funds will be available and more children will be included in Title I programs. It is expected that more general upgrading of school systems and more construction will be permitted. *It is the feeling of the Committee that when 30 or 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded."* House Report No. 1814, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. & Ad. News 3846 (emphasis added).

New Jersey claims that the district-wide low-income percentage for Newark for school year 1971-72 (33.9 percent) fits this model. Finally, New Jersey emphasizes that the narrative portion of the 1971-72 application shows Newark to have been uniformly disad-

vantaged in other important respects, citing high unemployment (14%), the highest percentage of slum housing in the nation, the highest incidents of crime, and the second highest birth rate. Also, in 1970-71 Newark had the highest population turnover in the nation, mobility rates reaching as high as 80 percent for schools in the Title I area. Hence, the Newark LEA had no choice but "to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served." Initial Br. p. 25

The Deputy Commissioner answers New Jersey as follows:

1. Newark did not seek, under the "no wide variance" rule, to have the New Jersey SEA declare the entire Newark school district eligible for Title I services. Nor did New Jersey, when it approved Newark's application, make such a determination. Therefore it is irrelevant whether the Newark LEA could have qualified had it made such a request.

2. Even if the Newark LEA had made such a request in its 1971-72 project application, it clearly would not have qualified as a "no wide variance" district.

3. The "no wide variance" rule, 45 CFR 116.17(d), begins: "In certain cases the whole of a school district . . ." etc. "In certain cases" is left undefined, allowing LEAs to make these determinations by applying a reasonable standard of "no wide variance" subject to the approval of the SEA.

4. Since Newark's 1971-72 application shows a variance in low-income percentage from a high of 84.7 percent to a low of 10 percent, the Newark LEA's variance during the period in question was 74.7 per-

cent. Under no conceivable interpretation of the "no wide variance" rule could a variance of 74.7 percent be deemed acceptable. Hence, Newark never could have qualified.

5. With respect to the statement from the 1966 House Labor Committee report (on which New Jersey relies) that "when 30 or 40 percent of the children in the district are from low-income families all of the children in the district could be considered disadvantaged," such legislative statement has no relevancy to Newark's 1971-72 Title I project. Neither the Title I statute nor the Title I regulations at the time provided for such an exception and OE did not consider this single statement an adequate basis for issuing a new regulation or amending the "no wide variance" rule since it was inconsistent with the basic Title I policy of meeting the special educational needs of only educationally deprived children.*

Having carefully considered both New Jersey's arguments and the Deputy Commissioner's counterarguments, the Panel has concluded that under the then applicable regulations the whole of the Newark school district could not have been considered educationally disadvantaged so as to come within the "no wide variance" rule and so as to be designated a district-wide Title I target area.

III. *Summary*

Based on the foregoing recitals and the record made in this proceeding, it is the conclusion of the Panel

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* Since the Board is not authorized to determine whether the regulations are consistent with the statute and the expressed legislative intent, the Panel must apply the regulations on the assumption they are valid.

that New Jersey should make the following payments to the U.S. Office of Education:

1. $1,674 in Title I funds relating to items a. and b. of Enclosure No. 1 to the Deputy Commissioner's letter of June 11, 1976.

2. $1,029,630 in Title I funds relating to item c. of Enclosure No. 1 to the Deputy Commissioner's letter of June 11, 1976.

Pursuant to Sections 100e.81 and 100e.82 of the interim federal regulations establishing procedures for the Education Appeal Board (44 Fed. Reg. 30528, May 25, 1979), this Decision is transmitted to the Commissioner and to the parties, and each party is given notice that it may submit written comments thereon to the Commissioner within a period of twenty-five (25) calendar days from receipt of the Decision. This Decision shall become the final decision of the Commissioner unless, within sixty (60) days after the State of New Jersey's receipt of the Decision, the Commissioner modifies or sets aside the Decision.

ALOYSIUS B. MCCABE
ROBERT MILLER
FRANKLIN M. SCHULTZ
Education Appeal Board Panel

By /s/ Franklin M. Schultz
FRANKLIN M. SCHULTZ
Chairman

Dated: February 19, 1980

APPENDIX E

EDUCATION APPEAL BOARD
UNITED STATES OFFICE OF EDUCATION
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

DOCKET NO. 10-(25)-76
INITIAL DECISION
ACN: 50000-03

APPEAL OF:

THE COMMONWEALTH OF PENNSYLVANIA
TITLE I, ESEA

INITIAL DECISION

APPEARANCES: For the Commonwealth of Pennsylvania (the "SEA"): Patricia Donovan, Deputy Attorney General and Chief Counsel, Pennsylvania SEA; Margaret Hunting, Deputy Attorney General; Donna Weldon and Emogene Trexel, Assistant Attorneys General;

For the Albert Gallatin Area LEA: Carmen Molinaro, Jr. and Gerald Solomon, Counsel;

For the Philadelphia LEA: Martin Horowitz, Assistant General Counsel;

For the McKeesport LEA: Robert P. Costello, Solicitor;

For the Allentown LEA: William Malkames, Solicitor;

For the Pittsburgh LEA: Robert Stefanko, Counsel;

For the Deputy Commissioner of Elementary and Secondary Education, U.S. Office of Education, Department of Health, Education, and Welfare ("The Deputy Commissioner"): Philip Rosenfelt, Robert Arnot, Stephen Freid, and Janet Knight, Office of General Counsel, Education Division.

I. *Procedural History*

The early procedural history of this appeal is set forth in the Panel's "Pre-Hearing Conference Statement", issued February 18, 1977 and "Ruling on Pre-Hearing Motions", issued May 9, 1978.

Subsequently, the parties submitted prehearing briefs (November 22, 1978) and "Stipulations" identifying the expenditures in question and indicating some areas of agreement (April 19, 1979).

The SEA moved to sever the appeal into five separate proceedings. The motion to sever was denied by the Panel in a written order dated May 9, 1979, on the ground that severance of the five claims would not simplify the evidentiary stage of the appeal or otherwise contribute to the expedition and convenience with which the case could be heard.

On May 2, 1979, the parties submitted joint exhibits, most of which were subsequently introduced into evidence. Hearings were held in Pittsburgh on May 17 and 18, 1979, to take testimony on the audit exceptions for Albert Gallatin, McKeesport, and Pittsburgh, and in Philadelphia on May 24 and 25, 1979, to hear testimony relating to Philadelphia and Allentown and general testimony going to all the exceptions. Transcripts of these hearings are an integral part of the record.

The SEA filed a posthearing brief out of time, but with the leave of the Panel Chairman, on August 17, 1979.[1] The SEA filed proposed findings of fact and conclusions of law on September 6, 1979.

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[1] In a telephone conversation with the Panel Chairman, counsel for the SEA indicated that if the Panel would accept the SEA's post-hearing brief, and proposed findings of fact and conclusions of law out of time, the SEA would not plan to file a reply brief. The Panel agreed to late filing, without conditions.

On October 1, 1979, the Deputy Commissioner filed a post-hearing brief and proposed findings of fact.

On October 15, 1979, the SEA requested oral argument on the application of the statute of limitations and other issues. The Panel denied this request by order dated November 9, 1979, concluding that the issues had been fully aired and that further arguments would only serve to delay a decision.

After discussion with both parties, the Panel proposed to the parties a draft "Consent Judgment" as a means of resolving this appeal without a final adjudication by the Panel.[2]

On December 5, 1979, the Deputy Commissioner tentatively approved the "Consent Judgment" subject to approval by the Department of Justice. However, by letter dated December 14, 1979, the State declined the Consent Judgment approach.

The Panel therefore issues this Initial Decision herein.

II. *Amounts in Dispute*

Despite an original claim of $1,295,584.00, the amount in dispute was reduced by stipulation to $676,692.73, involving five LEA's as follows:

Albert Gallatin	$242,282.92
Philadelphia	93,146.86
McKeesport	275,651.45
Allentown	45,639.00
Pittsburgh	19,972.50
Total	$676,692.73

[2] Under the terms of the proposed "Consent Judgment", the SEA would have refunded $333,279.58 relating to the Philadelphia, McKeesport, Allentown, and Pittsburgh exceptions and the Deputy Commissioner would have relinquished claims to $331,427.63 relating to the Albert Gallatin and McKeesport LEA's.

In its posthearing brief, the SEA argued that the amount in dispute for the Pittsburgh LEA should be further reduced because three elementary schools found by the Deputy Commissioner to be ineligible to receive Title I funds were in fact eligible. The Deputy Commissioner concedes this point in his posthearing brief and has withdrawn his claim for refund with respect to the three schools.

The Panel agrees to a reduction of the amount in dispute for the Pittsburgh LEA from $19,972.50 to $7,986.98, leaving in dispute in this appeal $664,-707.21.

III. *Summary of Initial Decision*

For the reasons stated below, the Panel rules that the Albert Gallatin Title I program for fiscal years 1971 through 1973, was properly designed and implemented to meet the special educational needs of educationally deprived children; therefore the $242,282.92 at issue should not be refunded by the SEA.

With respect to the four other LEA's, the Panel concludes that the SEA has not carried its burden of proof and for the reasons set forth below, the audit exceptions are sustained and the SEA should refund the following amounts:

On the grounds of general aid

Philadelphia LEA	(FY 1971)	$ 93,146.86
McKeesport LEA	(FY 1971-73)	$275,651.45

On the grounds of ineligible schools [3]

Pittsburgh LEA	(FY 1971)	$ 7,986.98
Allentown LEA	(FY 1973)	$ 45,639.00
	TOTAL REFUND DUE	$422,424.29

[3] The Panel did not reach the ineligible schools issue in the McKeesport exception, having sustained the exception on other grounds.

IV. *Title I Requirements at Issue*

Basically there are two Title I requirements at issue in this appeal. One requirement is that Title I programs be designed to meet the special educational needs of educationally deprived children; the second requirement is that Title 1 projects served educationally deprived children residing in eligible attendance areas.[4]

A. *Design of Programs*

The Deputy Commissioner found that the Albert Gallatin, Philadelphia, and McKeesport LEA's were using Title I funds to provide general aid to entire schools. The audtit exceptions were based on three sections of the Title I regulations in effect in fiscal years 1971 through 1973. 45 C.F.R. 116.17(a) and (c) provided that Title I projects had to be designed specifically to meet the special educational needs of educationally deprived children. 45 C.F.R. 116.17(f) added that projects should have been designed to meet the special educational needs of those educationally deprived children who had the greatest need for assistance.

The specific prohibition against general aid was contained in § 116.17(g):

> Each such project must be tailored to contribute particularly toward meeting one or more of the special educational needs of educationally de-

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[4] Although the SEA argued that these Title I requirements are invalid, the Panel has no authority to waive them or rule on their validity. See § 7 of the *Federal Register* notice establishing the Title I Audit Hearing Board, 37 *Fed. Reg.* 23002 (1972), as amended 41 *Fed. Reg.* 28568 (1976), and § 100e.61 (b) of the interim final regulations establishing the Education Appeal Board. 44 *Fed. Reg.* 30523 (1978).

prived children and *should not be designed merely to meet the needs of schools or of the student body at large* in a school or in a specified grade in a school. (Emphasis Added)

In the Panel's judgment, the key question in determining whether an LEA violated the general aid prohibition is not whether entire schools or grades may have benefitted in some way from Title I funds, but whether the LEA properly designed and implemented its Title I programs to meet the special educational needs of educationally deprived children.

B. *Eligibility of School Attendance Areas*

The Deputy Commissioner found that the McKeesport, Allentown, and Pittsburgh LEA's used Title I money to fund projects in schools that were ineligible to receive Title I funds. The audit exceptions were based on the statutory mandate that Title I funds were to be used only for programs in school attendance areas having high concentrations of children from low-income families. 20 U.S.C. 241e(a)(1).

45 C.F.R. 116.17(d) set forth two basic tests for determining eligible attendance areas. The first test was whether the estimated *percentage* of children from low-income families residing in the school attendance areas was as high as the percentage of such children residing in the school district as a whole. The second test was whether the estimated *number* of children from low-income families residing in the school attendance area was as large as the average number of such children residing in the school district.

Under Section 116.17(d), an entire school district might be designated as eligible to receive Title I funds only if there were no wide variances in the concen-

trations of children from low-income families among the several school attendance areas that made up the school district.

Certain problems in the selection of eligible attendance areas arose where LEA's were undergoing desegregation: Two program guides by the Office of Education allowed an LEA that did not have well-defined attendance areas because of the implementation of a desegregation plan to determine which schools were eligible to receive Title I funds on the basis of the *percentage or number* of low-income children actually attending each school.[5] The schools selected still had to have percentages or numbers of low-income children equal to or greater than the percentage or number of low-income children in the district as a whole.

These program guides and a handbook on selecting target areas issued by the Office of Education[6] also allowed an LEA undergoing desegregation to "follow the child" with the Title I services. Under this concept, a child who resided in an eligible attendance area, but who attended a school serving an ineligible attendance area because of a desegregation plan, was eligible to participate in a Title I program.

(The Panel considers the Title I regulations and other guidance to be clear on the subject of selecting eligible attendance areas.) An LEA could choose between the "numbers" approach, the "percentage" approach, or, in limited circumstances, the "no wide variance" approach. In addition, an LEA could provide Title I services to specific groups of children

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[5] ESEA Title I Program Guides #44 (March 18, 1968) and #64 (January 21, 1971) (Hearing Exhibits 204 and 203).

[6] *ESEA Title I—Selecting Target Areas*, Handbook for Local Title I Officials (1971) (Hearing Exhibit 205).

who resided in eligible attendance areas but who, as the result of desegregation, attended schools that served ineligible attendance areas. The Panel finds no authority in the regulations or other guidance for an LEA to serve whole schools or grades in otherwise ineligible schools simply because some eligible children were bussed to such schools from eligible attendance areas.

V. *Discussion, Findings and Conclusions*

A. *Albert Gallatin—$242,282.92*

The Albert Gallatin LEA used Title I funds in fiscal years 1971 through 1973 to pay the salaries of elementary art, music, and physical education teachers, and also the salaries of librarians and library aides. In the opinion of the auditors from the HEW Audit Agency, these programs served all children in the Albert Gallatin elementary schools and were not designed, as required by Federal regulation, to serve only identified educationally deprived children. The Deputy Commissioner agreed with the HEW auditors, concluding that the Title I regulations in effect if fiscal years 1971 through 1973 clearly precluded the provision of services which met the needs of student bodies at large.

The SEA has not denied that these Title I-funded teachers and library personnel served all the children attending elementary schools in the Albert Gallatin school district. However, the SEA has offered testimony to establish that the whole school district was ecnomically depressed, that all children in the district had little or no access to library services and art or musical opportunities, and that a very high proportion of the children were educationally de-

prived as measured by standardized tests. (TR. pp. 14-35, 63-76 and 97-111)

On the basis of those facts, the SEA argues that the programs in question were not designed "merely" to meet the needs of a student body at large and that Section 116.17(g) did not prohibit a properly designed program from having some "spill-over" or incidental benefit to those portions of the school population that may not, strictly speaking, have been educationally deprived in these areas.

In support of its position, the SEA points to guidelines published by the Office of Education in 1966, numbered OE-35079 [7], which stated that where schools were severely depressed and overwhelmingly impacted by educationally deprived children from low-income families, some projects would tend to benefit all the children in a school whether educationally deprived or not.

The SEA also argues that the Albert Gallatin program was modeled in good faith after a Title I program in Kentucky that the Office of Education had touted as exemplary in its 1970 publication "Improving Education Through ESEA: 12 Stories." [8] Testimony establishes that the LEA relied heavily on this Kentucky program in designing its program. (TR. pp. 57-59.)

The Deputy Commissioner argues, on the other hand, that neither the economic or cultural depression of the area, nor the fact that some or even a majority of the students were educationally deprived, justified the use of Title I funds to serve all the children in the schools.

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[7] Hearing Exhibit 207.

[8] Hearing Exhibit 16.

In regard to the OE-35079 guidelines, the Deputy Commissioner makes three basic points: (1) there was no evidence that the LEA relied on OE-35079; (2) OE-35079 did not state that projects could be designed to provide direct services to entire student bodies; and (3) the Title I regulations were amended in 1967 to specifically prohibit the use of Title I funds to serve entire school populations.

As for "12 Stories," the Deputy Commissioner found nothing that authorized LEA's to ignore Title I requirements or to serve all children regardless of educational deprivation. The Deputy Commissioner also noted that "12 Stories" was prepared by an independent contractor and was not an official statement of program policy.

The issue for the Panel is not whether all children were served, but whether, in these circumstances, serving all the children violated the Title I prohibition against general aid. The Panel finds that it did not.

The facts support the LEA's determination that virtually all the elementary school children in the area were educationally deprived in the areas of art, music, physical education, and library resources. The Panel finds it particularly difficult to consider children with little or no access to libraries or opportunity to participate in cultural activities as being anything but deprived in those areas.

The Panel also finds some reliance on the description of the Kentucky program in "12 Stories" to be reasonable. The Office of Education simply cannot publish a booklet bearing its name and purporting to describe model Title I programs, and then turn around and argue that Title I planners should not have relied on the publication.

Finally, the Panel does not construe § 116.17(g) of the regulations as an *absolute* prohibition against programs serving all the children in a school. While a program may not be designed "merely" to meet the needs of a student body at large, a program can be properly designed and still, when implemented, benefit all such children.[9]

This is not to say that providing Title I services to all the children in a school is not frequently an indication of a general aid problem; it cannot, however, become absolute proof of improper design.

For the reasons stated above, the Panel rules that the SEA is not required to refund the $242,282.92 at issue for these services.

B. Philadelphia—$93,146.86

In fiscal year 1971, the Philadelphia LEA used Title I funds to provide library assistants and counselor aides to project area schools. The HEW auditors found that the library assistants' duties involved routine clerical and mechanical tasks associated with the overall operation of the libraries, and that the counselor aides provided clerical and rountine interviewing services for counselors. The auditors concluded and the Deputy Commissioner concurred that the services constituted general aid and were not directly related to the special educational needs of educationally deprived children.

The SEA maintains that the library assistants and counselor aides provided various direct and indirect services to Title I students according to their needs, stating in its posthearing brief that minority personnel hired with Title I money served children who

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[9] See also, Final Decision, *Appeal of the State of Mississippi*, Docket No. 1-(16)-76, July 8, 1978, pp. 22-5.

asked for help, obviously needed help, or were referred by classroom teachers who had made a judgment that the children needed help.

The SEA also argues that the OE-35079 guidelines justified a program serving all the children in schools which were overwhelmingly impacted by educationally deprived children from low-income families.

At the evidentiary hearing, an SEA official observed that counselor aides were the link between counselors and minority children, and made counseling services more efficient. He further observed that library assistants performed clerical duties so that librarians could work directly with the children, or actually provided services to the children. (TR, May 24, 1979, pp. 430-438.)

The SEA also brought out, through the cross-examination of an HEW auditor, statements by LEA personnel to the effect that counselor aides were only in the schools with the most serious economic and social problems, and that 70% of the educationally disadvantaged were in target schools being serviced by the library aide program. (TR, May 25, 1979, pp. 567, 570.)

The Deputy Commissioner's arguments with respect to the Title I regulations prohibiting general aid and the OE-35079 guidelines have been summarized in the context of the Albert Gallatin exception.

With respect to Philadelphia, the Deputy Commissioner also argues that the SEA failed to submit any evidence to rebut the audit determinations, and that the probability that some eligible educationally deprived children were served by the Title I-paid counselor aides and library assistants did not excuse the lack of program design.

An OE witness testified at the hearing that the LEA used local funds to pay the salaries of counselor aides and library assistants performing similar services in non-Title I schools (Tr. May 25, 1979, pp. 549-559) and that the services of the counselor aides and library assistants benefitted the Title I children only to the extent that they benefitted non-Title I children. (TR, May 25, 1979, p. 577)

As with the Albert Gallatin exception, the issue is whether the Title I services were designed to meet the special educational needs of educationally deprived children. Unlike Albert Gallatin, the Panel finds insufficient evidence that the Philadelphia LEA so designated the programs in question.

The evidence presented indicates that the Title I-funded counselor aides and library assistants provided general services to all the children in the schools, without distinction between eligible and ineligible students. The fact that some self-selection may have taken place, or that teachers may have steered a higher proportion of eligible than non-eligible children to these services, even if conclusively proved, would not substitute for proper design. And, even if the use of aides to free counselors and librarians from routine clerical duties was a valid use of Title I funds, there is no evidence that the freed time of the counselors and librarians was devoted to the special educational needs of Title I children.

The Panel finds that the SEA failed to carry its burden of proof on this exception. The SEA is required to refund the entire $93,146.86 at issue.

C. *McKeesport—$275,651.45*

OE seeks refund of $275,651.45 with respect to expendituures by the McKeesport LEA during Fiscal

Years 1971, 1972, and 1973. The questioned expenditures were for the salaries of three categories of LEA employees:

Curriculum Coordinators	$178,289.42
Library Personnel	59,592.42
Clerical Personnel	37,769.61

The auditors found that these expenditures constituted general aid in violation of the Title I statute and regulations, and OE seeks refund of these amounts on that basis. In addition, the auditors found that $50,815.00 of the same expenditures were spent at allegedly ineligible schools. Thus, recovery of that amount is sought on two separate grounds.

The Panel took considerable testimony with respect to the educational philosophy underlying the McKeesport program during the years in question and the specific duties and responsibilities of the three categories of LEA personnel to which the auditors take exception. The testimony of Dr. Harry Faulk, Superintendent of the McKeesport Schools during the years in question, was particularly eloquent in describing the special problems imposed on school administration by implementation of a major desegregation effort. Were the Panel's task to assess the soundness of the McKeesport desegregation effort, we would find much in the record of merit. Unfortunately, the Panel's task is to determine whether the Title I programs being challenged were both designed and executed in compliance with statutory and regulatory requirements. The Panel finds that they were not and concludes that the entire $275,651.45 must be refunded.

With respect to the curriculum coordinators, the evidence shows that their primary purpose and func-

tion was to ease the burden of integration by absorbing the many extra demands which desegregation placed upon the school districts, its teachers, its students, and their families—both minority and nonminority, both advantaged and disadvantaged. In addition, there is little dispute that their work was designed to enhance and improve the curriculum for entire schools, not for any particular grades or any particular group of students within the schools. (Tr., May 18, 1979, at 230, 252, and 277.)

The Panel does not interpret the general aid prohibitions of 45 CFR 116.17(a)(f) and (g) so broadly as to prohibit projects that will benefit a broader class of children than those identified as "educationally deprived". Indeed, the special circumstances of desegregation may require an approach to meeting the needs of educationally deprived children which has something more than incidental spill-over to those not so deprived. On the other hand, the Title I regulations are clear in requiring an element of specific design, "tailoring", or "targeting" on not only educationally deprived children, but within that class those with the greatest need for assistance. (116.17(a), (f), and (g)). The Panel is unable to find substantial evidence of such program design either in the original project applications, in any contemporaneous record keeping, or in the post hoc testimony taken in the course of this proceeding. In short, it is simply not sufficient to allege that the educationally disadvantaged child can best be served by improving the curriculum of the schools at large. While that may have been the prudent course in the particular circumstances of the McKeesport LEA during its desegregation efforts, it is a course that like most other worthwhile educational endeavors must be financed with

state and local funds, not with the categorical monies of Title I.[10]

With respect to the library personnel, the Panel finds little importance to the distinction between "learning resource centers" and "libraries", the subject of much testimony and debate throughout this proceeding. Again, the question is not whether the project was meritorious, nor whether the personnel in the learning resource centers functioned in much the same way that locally funded librarians functioned in other schools. The critical test for purposes of determining compliance with the Title I regulations is whether the program was sufficiently tailored to meet the particular needs of the educationally deprived. Again, while the educationally deprived may have derived substantial benefit from these personnel, there was no evidence to support a finding that the projects

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[10] The testimony of the McKeesport personnel displayed sufficient sensitivity to the needs of those students identified as slow learners to make it difficult to characterize the program as one which was designed "merely" to serve entire schools. The Panel is not prepared to find that the curriculum coordinators served no function other than those of ordinary school principals, even though there was contemporaneous evidence supporting that allegation. However, there is no evidence to support a contrary finding that the projects were sufficiently tailored so as to make an identifiable class of educationally deprived children the principle beneficiary. Given that dilemma, the Panel made every effort to enable the parties in this case to avail themselves of a settlement or consent judgment which would have allowed them to "split the apple" in such a fashion as to reduce the financial penalty assessed many years after the fact against a school district that, in admittedly difficult circumstances, failed to follow the letter of the law. Since the SEA declined to avail itself of that opportunity, the Panel has no choice but to apply the law and regulation to the facts as it finds * * *.

were tailored so as to serve primarily those eligible students.

With respect to clerical personnel, there is no dispute that they provided general clerical support to the curriculum coordinators and other school personnel whose functions served the schools at large. Nor is there any dispute that the Title I funded clerical persons devoted substantial effort to work on non-Title I matters. While the SEA asserted that the clerical personnel were necessary to offset an increased clerical workload resulting from the Title I program, there was no offer of proof on this point. The SEA further argues that any portion of this clerical budget devoted to non-Title I matters should be offset by Title I work done by locally funded clerical personnel; however, even if proved, there is no basis in law for extending such a credit in this audit proceeding. Title I funds may only be used for the purposes set forth in a project grant application. It is irrelevant to these proceedings whether or not the LEA might have been entitled to use Title I monies for personnel or projects not delineated in its grant application.[11]

Having sustained the full amount of the audit exception on the ground of general aid violations, the Panel need not reach the ineligible schools issue at McKeesport. While there are most certainly circumstances in which Title I monies can "follow the child"

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[11] For similar rulings by other Hearing Panels of the Board, see the final decisions in the *Appeal of the State of Texas*, Docket No. 7-(9)-74, February 10, 1978, p. 4, and the *Appeal of the State of Iowa*, Docket No. 3-(5)-74, December 7, 1977, pp. 11-12. In those decisions, the Panels held that Title I funds could be used only for programs described in applications for Title I funds that had been approved through the grant process.

in the desegregation situation, there would still have to be a showing that the funds were appropriately targeted to those specific students bussed from eligible attendance areas into otherwise ineligible receiving schools (thus overcoming the general aid prohibition). Given the relatively small percentage which the bussed children represented in the receiving schools, the burden of showing that the funds benefitted those children primarily, as opposed to the receiving schools at large, would be a serious one.

D. *Allentown—$45,639.00*

In its fiscal year 1972 and 1973 Title I applications, the Allentown LEA requested approval to provide reading services to 15 children in each of 15 ineligible schools. The children were to be residents of eligible attendance areas who were bussed to ineligible schools. The auditors found that although the SEA approved this application with the program limited to children residing in eligible attendance areas, in fiscal year 1973, only 34 of 236 students bused to the ineligible schools actually participated in the program. These 34 represented only 11.26 percent of the 302 children actually served by the program.

The Deputy Commissioner concluded that the LEA was not justified in serving the high number of children who attended ineligible schools and resided in ineligible attendance areas. Refund was demanded with respect to those children from ineligible attendance areas, but no refund is sought with respect to the 34 bussed children.

The parties have stipulated that the LEA's Title I application for fiscal year 1973 listed the percentages of children from low-income families in the various school attendance areas as ranging from 3 to 25%,

and that the SEA used an 8% variance factor to determine if an entire school district could be designated as a single project area under the "no wide variance" rule. The parties also agreed that under an order from the Pennsylvania Human Relations Commission, a desegregation plan was in effect in Allentown during fiscal year 1973. Under the plan, one school was closed, a second school was converted to a special education center, and the children who would have attended those schools were bussed to other schools in the LEA.[12]

The SEA does not dispute that of the 302 children who participated in the reading program in fiscal year 1973, only 34 were bussed into the schools under the desegregation plan.

The SEA argues that all schools in Allentown were eligible for Title I services, citing the desegregation order, OE directives on desegregation, and Federal and Pennsylvaia law barring discrimination on the basis of race as justification for its position. The SEA also argues that the LEA implemented a valid "follow the child" plan.

The Deputy Commissioner relies on the Title I regulations and other guidance to establish the two basic tests for selecting Title I-eligible school attendance areas, the "no wide variance" rule, and an LEA's limited authority to "follow the child". These basic tests and limited exceptions are discussed in III B. above.

The Deputy Commissioner argues that the 15 schools at issue were ineligible to receive Title I funds under both the percentage and number tests; that the entire LEA could not qualify as eligible under the

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[12] Stipulations, April 19, 1979, pp. 19-22.

"no wide variance" rule; and, finally, that there was no authority under which the LEA could designate all schools as eligible just because it was implementing a desegregation plan.

The Deputy Commissioner argues that the "follow the child" concept can support only the 34 children bussed from eligible attendance areas to ineligible schools (with respect to which no refund is claimed). Further, while a few children from ineligible attendance areas could properly have participated in the reading program to ensure integrated classes, it was not necessary to include 268 ineligible children to provide an integrated program for only 34 eligible children; a "follow the child" program still had to be designed and implemented to meet the needs of identified eligible children, not classes at large in the receiving schools.

As with McKeesport, the desegregation situation in Allentown undoubtedly posed special difficulties in implementing Title I. However, Allentown was not authorized by the Title I regulations, the Office of Education program guides, or the handbook on selecting target areas to designate all the schools in the district as eligible for Title I.

The only Title I provision which authorized designation of an entire school district as eligible was the "no wide variance" rule in Section 116.17(d) of the regulations. The Allentown LEA, with concentrations of children from low-income families ranging from 3 to 25% among the various school attendance areas, did not meet this "no wide variance" standard.

As for the "follow the child" rationale, the Panel is not convinced that the program was properly designed to focus on the children who were bussed from eligible school attendance into ineligible schools. Although it

may have been necessary to serve some small number of children from ineligible attendance areas to avoid resegregating the Title I children, the SEA has not shown that it was or could have been necessary to include 268 ineligible children to avoid segregating 34.

The Panel therefore rules that the SEA should refund the entire $45,639.00 at issue for this exception.

E. *Pittsburgh—$7,986.98*

Despite audit exceptions and a claim for refund initially involving twelve schools, the dispute with respect to Pittsburgh has subsequently been narrowed to six schools and $7,986.98, all in fiscal year 1971. With respect to five of the schools, the issue is whether they served attendance areas having the requisite concentration of children from low-income families. The sixth school was not among those listed on the LEA's Title I application to the SEA for the year in question.

The auditors found that the LEA funded Title I projects in five schools which, on the face of the LEA's application, had concentrations of low-income children below the district-wide average and were thus ineligible schools. The SEA asserts that despite the estimated concentrations of low-income children shown in Title I application, the LEA was nontheless entitled to declare these schools eligible on the basis of other available "data". A witness for the SEA testified that this latter information came from community action groups, the LEA's Title I advisory council, and teachers.[13]

The SEA further argues that the five schools served areas with high concentrations of children from low-income families, relying on a map of Pittsburgh

[13] Transcript, May 17, 1979, pp. 182-90.

indicating severely depressed areas of the city.[14] Several witnesses testified at length as to the geographic and demographic characteristics of the city, the preparation of the map by a local anti-poverty organization on the basis of census data, and the proximate location of the schools in question to the severely depressed areas indicated on the map.[15]

With respect to the sixth school, Arsenal Middle School, the SEA asserts that it was not included in the LEA's Title I application for fiscal year 1971 because it was not opened until late in the school year. The SEA also argues that the map of Pittsburgh prepared by the anti-poverty organization indicated that the school drew its student body from areas of high concentrations of low-income children, and that the school was eligible and funded by Title I in the following fiscal year.

With respect to the five schools, the Deputy Commissioner argues that a map prepared by a local anti-poverty organization indicating depressed areas had no relevance to the LEA's selection of schools for Title I. He points out that the anti-poverty organization did not define poverty areas in the same manner that LEA's were to select eligible school attendance areas under Title I regulations; that the map was not prepared for the use of the LEA; and that neither the LEA in selecting areas or the SEA in approving the selection relied on the map.

The Panel concludes that the five schools were improperly designated for 1971. The regulations and program guides clearly required an LEA to use percentages or numbers of low-income children as the

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[14] Hearing Exhibits 81 and 85.

[15] Transcript, May 17, 1979, pp. 141-180.

basis for its selection of eligible schools. The LEA's application indicated on its face that the five schools were not eligible on either a percentage or number basis.

The Panel finds no basis in law for reliance on the supplemental information brought forward after the fact and not even referenced on the original application. If special circumstances warranted a special interpretation of available data, that should have been disclosed to, and discussed with the SEA at the time of application.

As for the Arsenal Middle School, the Panel agrees with the Deputy Commissioner that the appropriate way to handle a school opening in mid-year is by amendment to the application, not unilateral action by the LEA. As noted at footnote 11 *supra*, Title I funds may only be used in the manner requested by the LEA in an application.

The SEA should refund the entire $7,986.98 remaining at issue.

VI. *Collateral Issues*

In its posthearing brief submitted August 17, 1979, the SEA raises a number of issues that do not bear directly on the merits of the individual audit exceptions. Several issues, specifically those involving Board authority, jurisdiction,and procedures, burden of proof, and availability of Government witnesses for cross-examination, were raised by the SEA in its prehearing motions. Since the Panel addressed those issues in its "Ruling on Pre-hearing Motions," dated May 9, 1978, we see no need to readdress those issues in this opinion.

The SEA also challenges the Panel's conduct of the evidentiary hearings. The SEA questions the Panel's

denial of an SEA motion to sever the appeal into five separate proceedings; a subsequent ruling establishing the order of testimony; and the admission of various evidence. The Panel considers all these questions to have been properly raised, ruled on, and preserved for the record during the course of the evidentiary hearings, and declines further comment thereon.

The SEA also argues that the Office of Education is estopped, through the publication of various conflicting documents, from pursuing these audit exceptions. However, the SEA has not established either substantial conflicts in the Office of Education publications or detrimental reliance on those publications. This is sufficient for the Panel to rule that the Office of Education is not estopped from seeking a refund in this case, without expressing an opinion as to what, if any circumstances might justify application of the estoppal doctrine against the Office of Education as a Federal agency.

Four further issues raised by the SEA, two in the form of motions to dismiss, are discussed briefly below.

1. *Conduct of the Audit*

The SEA argues that HEW's review of the SEA's administration of the Title I program was not a proper audit, claiming that the review was untimely, the auditors unqualified, and at least one auditor biased. Throughout the proceedings, the SEA has pointed to findings and statements in the auditors' workpapers, alleging them to be in error.

The Deputy Commissioner responds to these arguments by stating that the purpose of the appeal is to review his determinations, not the auditors' findings and recommendations. He points out that the SEA did not dispute the factual findings of the auditors

and maintains that the audit was conducted in a highly competent and professional manner.

The Panel does not believe that the Deputy Commissioner's determinations can be separated entirely from the basis for those determinations, the HEW auditors' findings as contained in the final audit report. While it is doubtful that the Panel's jurisdiction to review the Deputy Commissioner's final audit determinations would extend to a ruling on the propriety or impropriety of audit procedures, it is also obvious that serious errors on the part of the auditors would affect the validity of the Deputy Commissioner's determinations. However, the SEA was given ample opportunity through this appeal to prove the auditors and the Deputy Commissioner wrong. The Panel believes that the SEA's interests in a properly conducted audit were sufficiently protected by the forum provided through this appeal.

The Panel further finds that the alleged errors and misstatements in the auditors' workpapers, even if fully proven, were not so substantial or serious in nature that the validity of the entire audit report is thrown into question.

For the reasons given above, the SEA's motion to dismiss the audit exceptions on the basis of an improper audit is denied.

2. *Statute of Limitations*

The statute of limitations applicable to these audit exceptions reads as follows:

> No State or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be

> unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized.[16]

Since the SEA received the final audit determination letter from the Deputy Commissioner on May 20, 1976, May 20, 1971 is the relevant cut-off date for applying the statute of limitations.[17]

In its posthearing brief, the SEA argues that the statute of limitations bars recovery of any "payment" made to the SEA prior to May 20, 1971. Since the SEA received its amended Title I payment for fiscal year 1971 on November 2, 1970, the SEA would make this the operative date.

The Deputy Commissioner, in response, relied on the "Stipulations" submitted by the parties on April 19, 1979. He maintained that by stipulating that $676,692.73 in Title I funds remained in dispute for the five exceptions, the parties had agreed that the statute of limitations did not bar recovery of the $676,692.73.

The Panel need not rely on the "Stipulations" to agree with the Deputy Commissioner that May 20, 1971, not November 2, 1970 is the operative date.

The word "payment" as used in the statute of limitations must be read in the context of the entire statute to effectuate its purpose. There is no direct relationship between the date money flows from the Federal government to the States and the time at

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[16] 20 U.S.C. § 3383 (Supp. 1979), formerly 20 U.S.C. § 804.

[17] See also Final Decision, *Appeal of the State of California*, Docket No. 6-(21)-76, August 21, 1978, pp. 8-9, and Final Decision, *Appeal of the State of Iowa*, Docket No. 3-(5)-74, December 7, 1977, pp. 13-14.

which expenditures at the State and local level can be characterized as "unauthorized". In the Panel's opinion, a payment becomes "unauthorized" only when funds are spent in violation of Title I requirements. Thus the Panel concludes that the date of expenditure should govern the application of the statute of limitations.[18]

The Panel notes that this interpretation is consistent with Congress' recent enactment of a statute of limitations for audit appeals coming before the Education Appeal Board. That statute provides that an SEA shall not be liable to refund an expenditure determined to be unauthorized by law if the expenditure was made more than five years before the SEA received written notice of the final audit determination.[19]

3. *Notice of Evidentiary Hearing*

Item 5 of the General Provisions establishing procedures for the Title I Audit Hearing Board, which were in effect in May 1979, at the time the evidentiary hearings in this appeal were conducted, provided that appropriate notice of generally not less than 25 days would be given in the *Federal Register* as to the time and place of such hearings.[20] The office

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[18] See Order on State of Oklahoma's "Supplemental Brief on Excessiveness of Refund Demand," *Appeal of the State of Oklahoma*, Docket No. 4-(34)-77, January 29, 1980, pp. 2-12, for a detailed discussion of the statute of limitations. See also Final Decision, *Appeal of the State of Iowa*, Docket No. 3-(5)-74, December 7, 1977, pp. 13-14 for a ruling that the date the SEA "drew down" Title I funds was irrelevant in gauging the reach of the statute of limitations.

[19] General Education Provisions Act, § 452(g), 20 U.S.C. 1234a(g) (Supp. 1979).

[20] General Provisions, Title I Audit Hearing Board, March 1, 1976.

of the Board, through an administrative error, failed to publish a notice of the hearings in the *Federal Register*.

The SEA argues that the audit exceptions should be dismissed on the ground the Board failed to observe its own procedures. The SEA also asserts that the Board failed to observe the provisions of the Government in the Sunshine Act.[21] In response, the Deputy Commissioner argued that the SEA was not harmed in any way by the Board's failure to publish notice of the hearings, and that the Government in the Sunshine Act was not applicable to Board proceedings.

The Panel finds that the SEA and the LEA's had actual notice of the time and place of the evidentiary hearings some two and one-half months before the hearings. The hearings were scheduled at times and places convenient to the SEA, the LEA's, and their witnesses. Since the SEA and LEA's had actual notice of the hearings, and the SEA had not alleged any harm resulting from the lack of notice, the Panel rules that the Board's failure to publish notice of the hearings does not amount to a procedural error serious enough to warrant dismissal.[22]

The Panel also finds that the Government in the Sunshine Act applies to agencies headed by collegial bodies.[23] Since the Education Appeal Board is part

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[21] 5 U.S.C. § 552b.

[22] A Notice of the appeal was published in the *Federal Register* prior to the pre-hearing conference. At that time, interested parties had an opportunity to intervene. Those that came forward were added to the formal service list in this appeal and thereafter received actual notice of all Board proceedings.

[23] 5 U.S.C. 552b.

of an agency headed by a Secretary rather than a collegial body, the Government in the Sunshine Act does not apply to Board proceedings.

The Panel denies the SEA's motion to dismiss the audit exceptions for failure to publish notice of the evidentiary hearings in the *Federal Register*.

4. *Petition to ReOpen the Record*

On February 25, 1980, the SEA petitioned this Panel to reopen the record in this appeal for the purpose of adding a letter dated July 31, 1975 from the Deputy Commissioner to the SEA. The letter concerned application of the statute of limitations to another, unrelated audit exception.

For the reasons set forth in the Deputy Commissioner's opposition dated February 29, 1980, the Panel declines to reopen the record at this late date.

VII. *Conclusion*

Based on the record compiled in this proceeding and consideration of the matters raised by the parties, the Panel concludes that the SEA should submit payment in the amount of $422,424.29 to the Department of Education.[24]

Under Section 100e.81 of the interim final regulations establishing procedures for the Education Appeal Board,[25] this decision will be transmitted to the Secretary of Education. Each party may submit written comments and recommendations on the decision to the Secretary within 25 calendar days of re-

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[24] The responsibilities of the Office and Commissioner of Education were formally transferred to the new Department and Secretary of Education respectively as of May 6, 1980.

[25] 44 *Fed. Reg.* 30528 (1979).

ceipt of this decision. This decision will become the final decision of the Secretary unless, within 60 calendar days of the SEA's receipt of this decision, the Secretary modifies or sets aside the decision.

Education Appeal Board

/s/ Robert J. Saner II
ROBERT J. SANER II
Chairman
DR. CHARLES E. HANSEN
OLCOTT D. SMITH, ESQUIRE

Date: May 7, 1980

APPENDIX F

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of Education
Washington, D.C. 20202

May 7, 1980

CERTIFIED MAIL
Honorable Fred G. Burke
Commissioner of Education
State Department of Education
Trenton, New Jersey 08625

Reference: Appeal of the State of New Jersey
Docket No. 14-(29)-76
Audit Control No. 50006-02

Dear Commissioner Burke:

A copy of the Panel's decision in the above-referenced appeal was sent to New Jersey on February 27, 1980, and received March 4, 1980. It is my duty to inform you that the Panel's decision, after the appropriate period for comment and review, now stands as the final decision of the U.S. Department of Education. In its decision, the Panel ruled that New Jersey should refund $1,031,304 to the Department of Education. Appropriate authorities within the Department will be in touch with you at an early date to discuss the method of repayment of the funds in question.

These proceedings before the Board now are closed.

Sincerely,

/s/ David S. Pollen
DAVIL S. POLLEN
Chairman
Education Appeal Board

cc: Dr. Thomas K. Minter, ED
Mr. William L. Ward, ED
Mr. Philip Rosenfelt, ED
Ms. Kathleen Duncan, New Jersey

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
Office of Education
Washington, D.C. 20202

July 16, 1980

CERTIFIED MAIL
Honorable Robert G. Scanlon
Secretary of Education
State Department of Education
Harrisburg, Pennsylvania 17126

Reference: Appeal of the State of Pennsylvania
Docket No. 10-(25)-76
Audit Control No. 50000-03

Dear Secretary Scanlon:

A copy of the Panel's decision in the above-referenced appeal was sent to Pennsylvania on May 9, 1980, and received May 13, 1980. It is my duty to inform you that the Panel's decision, after the appropriate period for comment and review, now stands as the final decision of the U.S. Department of Education.

In its decision, the Panel ruled that Pennsylvania should refund $422,424.29 to the Department of Education. Appropriate authorities within the Department will be in touch with you at an early date to discuss the method of repayment of the funds in question.

These proceedings before the Board now are closed.

Sincerely,

/s/ David S. Pollen
DAVIL S. POLLEN
Chairman
Education Appeal Board

cc: Dr. Thomas K. Minter, ED
Mr. William L. Ward, ED
Mr. Philip Rosenfelt, ED
Ms. Emogene Trexel, Pennsylvania
Ms. Margaret Hunting, Pennsylvania
Mr. Gerald Solomon, Albert Gallatin
Mr. Martin Horowitz, Philadelphia
Mr. Robert Costello, McKeesport
Mr. Robert Stefanko, Pittsburgh

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 371728 668

Office-Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 17, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

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GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case. No. 80-1991

Date	FILINGS—PROCEEDINGS
1980	
July 7	Petition for review of a decision of the Secretary of Education, received July 7, 1980, filed. (6cc) Service attached.
	Copy of above petition served by mail on Secretary of Education.
July 15	Appearance of John J. Degnan and M. Kathleen Duncan, Esqs., for petitioner, filed.
July 21	Appearance of Philip H. Rosenfelt and Robert J. Arnot, Esqs., for respondent, filed.
Aug. 18	Certified list of the record on review, filed. (1cc—3 add'l cc rec'd 8/29/80)
Sept. 26	Consent motion by petitioner for leave to extend time to file brief and appendix to October 29, 1980, *with* Affidavit of M. Kathleen Duncan, Esq., in support of motion, filed. (4cc) Service attached.
Oct. 1	Submitted on above consent motion. Clerk
Oct. 3	Order (Clerk) granting the above consent motion and stating that no further extensions will be permitted for any reason, filed.
Nov. 3	Consent motion by petitioner for leave to file brief and appendix out of time by November 3, 1980, *with* Affidavit of M. Kathleen Duncan, Esq., in support of motion, filed, (4cc) Service attached.
Nov. 5	Submitted on above consent motion. Clerk.

Date	FILINGS—PROCEEDINGS

1980

Nov. 6 Order (Clerk) granting the above consent motion under the circumstances and directing that petitioner's brief and appendix are filed as of the date of this order, filed.

Nov. 6 Brief for petitioner, rec'd November 3, 1980, filed. (25cc) Certification of bar membership attached.

Nov. 6 Appendix, Vols. I, II, III & IV, rec'd November 3, 1980, filed. (4cc)

Nov. 6 Affidavit of service of petitioner's brief and appendix by mail on 11/3/80, rec'd 11/3/80, filed.

Nov. 21 Consent motion by respondent for leave to extend time to file brief to January 8, 1981, filed. (4 cc) Affidavit of service attached.

Nov. 26 Submitted on above consent motion. Clerk

Dec. 2 Order (*Clerk*) granting the above consent motion and no further extensions will be permitted, filed.

1981

Jan. 7 Brief for respondent, w/service by mail on 1/7/81, filed. (25 cc)

Jan. 29 Consent Motion—O/T pet's R.B. by 2/2/81, w/service, filed.

Feb. 2 Submitted. Clerk.

Feb. 4 Order (*Clerk*) Granting pet's mot. to file R.B. o/t by 2/2/81 and no further XT will be permitted, filed.

Feb. 2 R. brief for petitioner, w/service by mail on 2/2/81, filed. (25 ccs) Cert. of bar membership attached.

May 7 Order (*Adams*, C. J.) directing 15 mins. oral argument time for each side, filed.

May 18 Argued. Coram: Adams, Rosenn & Higginbotham, C.J. (Court directed counsel to have trans. of oral argmt. prepared).

Date	FILINGS—PROCEEDINGS

1981

June 18 Transcript of tape of oral argument in this Ct. on 5/18/81, rec'd at direction of Court.

Oct. 13 Order (Adams, Rosenn & Higginbotham, C.J.) consolidating the petitions for reivew at Nos. 80-1991 & 80-2302 for disp. by the Ct., filed. (Cov. 80-1991 & 2302)

Oct. 13 Opinion of the Court (Adams, *Rosenn* & Higginbotham, C.J.), w/concur by J. Higginbotham, filed. (Cov. 80-1991 & 2302)

Oct. 13 Judgment granting the petition for review; reversing the order of the U.S. Dept. of Education dated 5/7/80, appealed at No. 80-1991, & 7/16/80, appealed at No. 80-2302 and remanding the causes for vacation of the orders requiring repayment by petrs. of previously rec'd Title I funds, w/costs against resp., filed. (Cov. 80-1991 & 80-2302)

Oct. 26 Motion—XT resp's pet. for rehg for 30 days to 11/26/81, w/serv., filed. (Cov. 80-1991 & 2302)

Oct. 27 Bill of costs for petitioner, w/serv., filed.

Oct. 30 Order (Rosenn., C.J.) granting above XT mot. to file pet. for rehg. by 11/26/81, filed. (Cov. 80-1991 & 2302)

Nov. 30 Motion by respondent to file pet. for rehg. which includes a 7 pg. addendum in addition to the 15 pgs. of text, or in the alt., to strike the 7 page addendum from such pet. as filed by resp., w/serv., filed. (Cov. 80-1991 & 2302)

Dec. 7 Order (Rosenn, C.J.) granting resp's mot. for leave to file pet. for rehg. with addendum attached, filed. (Cov. 80-1991 & 2302)

Dec. 7 Petition by respondent for rehg. & suggestion for rehg. en banc, w/addendum, w/serv., filed. (25 cc) (Cov. 80-1991 & 2302)

Dec. 17 Order denying petition for rehg. for the Court en banc, filed. (cov. Nos. 80-1991 & 80-2302)

Date	FILINGS—PROCEEDINGS

1980

Dec. 28 Cert. judgm. issued in lieu of formal mandate. (cov. Nos. 80-1991 & 80-2302)

1982

Jan. 20 Costs taxed in the amount of $359.29 in favor of petr. Commonwealth of PA added to Cert. judgm. pursuant to Rule 39(d), F.R.A.P.

Dec. 28 Certified list returned to the Secretary.

Mar. 10 Copy of letter dated 3/8/82, to Sol. General of the U.S., adv. the S.C. XT for filing cert. to 4/16/82, rec'd from C of the S.C. (Cov. 80-1991 & 80-2302)

Apr. 8 Copy of letter dtd. 4/8/82, to Sol. General of the U.S., adv. the S.C. has XT for filing cert. to 5/16/82, rec'd from C of the S.C. (Cov. 80-1991 & 80-2302)

May 21 Notice—Cert. filed 5/17/82, filed. (S.C. No. 81-2125) (Cov. 80-1991 & 2302)

Oct. 7 Order—Cert. granted 10/4/82, filed. (S.C. No. 81-2125) (Cov. 80-1991 & 80-2302)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 80-2302

Date	FILINGS—PROCEEDINGS

1980

Sept. 16 Petition for review of a decision of the Education Appeal Board of the United States Department of Education, received September 16, 1980, filed (6cc.) Service attached.

Copy of above petition served by mail on respondent.

Sept. 29 Appearance of Margaret Hunting, Esq., for petitioner, filed.

Oct 3 Appearance of Emogene L. Trexedl, Esq., for petitioner, filed.

Oct. 14 Appearance of Robert J. Arnot and Stephen H. Freid, Esqs., for respondent, filed.

Oct. 27 Certified List of Record on Review, filed. Service attached.

Nov. 26 Consent motion by petitioner for leave to extend time to file brief and appendix to January 7, 1981, filed. (4cc) Service attached.

Dec. 3 Submitted on above consent motion. Clerk.

Dec. 17 Order (Clerk) granting the above consent motion and stating that no further extensions of time will be permitted, filed.

1981

Jan. 7 Appendix, rec'd January 12, 1981, filed. (10cc)

Jan. 7 Brief for petitioner, rec'd January 22, 1981, filed. (25cc) Service by mail on 1/7/81 attached. Certification of bar membership attached.

Jan. 7 Addendum to brief for petitioner, rec'd January 12, 1981, filed. (25cc)

Date	FILINGS—PROCEEDINGS

1981

Jan. 26 Consent motion—XT respondent's B. to 3/11/81, w/serv., filed.

Jan. 30 Submitted. Clerk.

Feb. 2 Order (*Clerk*) granting above CM & no further extensions of time will be permitted, filed.

Mar. 11 Brief for respondent & addendum, w/serv. by mail on 3/11/81, filed. (25 cc)

Mar. 25 Consent Motion by petitioner to XT to file reply brief to 4/6/81, w/serv., filed.

Mar. 27 Submitted on above mot. Clerk.

Mar. 31 Order (Clerk) granting above mot., filed.

Apr. 6 Reply brief for petitioner, filed. (25 cc) w/serv. by mail on 4/6/81 & cert. of bar mbrshp attached.

Apr. 9 Actual Document No. 67 (1 copy in 4 vols—pgs. 1-634—Transcript) from record list received, w/service, filed. [Rec'd from U.S. Dept. of Educ. in D.C.] Filed with record list.)

Apr. 17 Motion by respondent for an order striking from the record the affidavit of Mr. William Dallam attached to petitioner's reply brief, *or*, in the alternative, if mot. is denied, resp. be allowed to file affidavits from former U.S. Secretary of Education Shirley Hufstedler, and a present official of the U.S. Dept. of Education, etc., w/ Memorandum in support, w/serv., filed.

Apr. 20 Submitted on above Mot. Coram: Adams, Rosenn & Higginbotham, C.J.

Apr. 27 Motion—O/T petitioner's response in opposition to mot. to strike affidavit, etc., by 4/27/81, w/serv., filed.

Apr. 27 Response by petitioner in opposition to mot. by respondent to strike affidavit, w/serv., received. . . . . .

Apr. 29 Submitted on petitioner's mot. to file response O/T. Coram: Adams, Rosenn & Higginbotham

Date	FILINGS—PROCEEDINGS
1981	Filed
May 15	Letter dated 5/12/81, from Margaret Hunting, Esq., counsel for pet., rec'd for info. of Court.
May 7	Order (Adams, C.J.) directing 20 mins. oral argmt. time for each side, filed.
May 18	Argued. Coram: Adams, Rosenn & Higginbotham, C.J. (Court directed counsel to have transcript of tape of oral argument prepared)
June 18	Transcript of tape of oral argument in this Ct. on 5/18/81, rec'd at direct. of Ct.
July 6	Corrections to transcript of tape of oral argument, received.....
Oct 13	Order (Adams, *Rosenn* & Higginbotham, C.J.) consol. petition for review at Nos. 80-1991 & 80-2302 for disp. by the Court, filed. (Cov. 80-1991 & 80-2302)
Oct. 13	Opinion of the Court (Adams, *Rosenn* & Higginbotham, C.J.), w/concur by J. Higginbotham filed. (Cov. 80-1991 & 2302)
Oct. 13	Judgment granting the petitions for review; reversing the order of the U.S. Dept. of Educ. dated 5/7/80, appealed at No. 80-1991, and 7/16/80, appealed at No. 80-2302 and remanding the caused for vacation of the orders requiring repayment by petrs. of previously rec'd Title I funds, w/costs against resp., filed. (Cov. 80-1991 & 80-2302)
Oct. 13	Order (Adams, *Rosenn* & Higginbotham, C.J.) granting resp's mot. to strike the affidavit of William Dallam, etc., filed.
Oct. 13	Order (Adams, *Rosenn* & Higginbotham, C.J.) denying pet's mot. to file response O/T to mot. by resp. for order striking affidavit of Mr. William Dallam, etc., filed.
Oct. 26	Motion—XT resp's pet. for rehg. for 30 days to 11/26/81, w/serv., filed. (Cov. 80-1991 & 2302)
Oct. 26	Bill of costs for petitioner, w/serv., filed.

Date	FILINGS—PROCEEDINGS
1981	Filed
Oct. 30	Order (Rosenn, C.J.) granting above XT mot. to file pet. for rehg. by 11/26/81, filed. (Cov. 80-1991 & 2302)
Nov. 30	Motion by respondent for leave to file pet. for rehg. which incls. a 7 pg. addendum in addition to the 15 pgs. of tex, or in the alt., to strike the 7 page addendum from such pet. as filed by resp., w/serv., filed. (Cov. 80-1991 & 2302)
Dec. 7	Order (Rosenn, C.J.) granting resp's mot. for leave to file pet. for rehg. with addendum attached, filed. (Cov. 80-1991 & 2302)
Dec. 7	Petition by respondent for rehg. & sugg. for rehg. en banc, w/addendum, w/serv., filed. (25 cc) (Cov. 80-1991 and 2302)
Dec. 17	Order denying petition for rehg. for the Court en banc, filed. (Cov. Nos. 80-1991 & 80-2302)
Dec. 28	Cert. judgm issued in lieu of formal mandate. (covered Nos. 80-1991 & 80-2302)
Dec. 28	Certified list and Actual Document No. 67 frm. rec. list ret. to Sec.
1982	
Jan. 20	Costs taxed in the amount of $359.29 in favor of petitioner Commonwealth of PA added to Cert. judgm. pursuant to Rule 39(d), F.R.A.P.
Mar. 10	Copy of letter dated 3/8/82, to Sol. General of the U.S., adv. the S.C. has XT for filing cert. to 4/16/82, rec'd from C of the S.C. (Cov. 80-1991 & 2302)
Apr. 8	Copy of letter dtd. 4/8/82, to So. General of the U.S., adv. the S.C. has XT for filing cert. to 5/16/82, rec'd from C of the S.C. (Cov. 80-1991 & 2302)
May 21	Notice—Cert. filed 5/17/82, filed. (S.C. No. 81-2125) (Cov. 80-1991 & 2302)
Oct. 7	Order—Cert. granted 10/4/82, filed. (S.C. No. 81-2125) (Cov. 80-1991 & 80-2302)

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
REGION II

26 Federal Plaza
New York, New York 10007

Audit Agency

June 20, 1975

Audit Control No. 50006-02

Dr. Fred G. Burke
Commissioner
New Jersey State Education Department
225 West State Street
Trenton, New Jersey 08625

Dear Dr. Burke:

Enclosed for your information and use is a copy of an HEW Audit Agency report titled, "Audit of Title I of the Elementary and Secondary Education Act of 1965 Administered by the State of New Jersey, Relating to Selection of Target Areas in Newark, New Jersey, for the period September 1, 1970, to August 31, 1973." Your attention is invited to the audit findings and recommendations contained in the report.

In accordance with the principles of the Freedom of Information Act (Public Law 90-23), HEW Audit Agency reports issued to the Department's grantees and contractors are made available, if requested, to members of the press and general public.

To facilitate identification, please refer to the above audit control number in all correspondence relating to this report.

Sincerely yours,

/s/ Bernard Luger
Regional Audit Director
HEW Audit Agency

Enclosure

Direct Reply To:

Deputy Commissioner
Bureau of School Systems
Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Audit Control No. 50006-02

REPORT OF AUDIT
TITLE I OF THE
ELEMENTARY AND SECONDARY EDUCATION
ACT OF 1965
Administered by the
STATE OF NEW JERSEY

Relating to Selection of Target Areas
in Newark, New Jersey

For the Period
September 1, 1970, to August 31, 1973

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REPORT OF AUDIT
TITLE I OF THE
ELEMENTARY AND SECONDARY EDUCATION
ACT OF 1965
Administered by the
STATE OF NEW JERSEY

Relating to Selection of Target Areas
in Newark, New Jersey

For the Period
September 1, 1970, to August 31, 1973

INTRODUCTION

Background

Title I of the Elementary and Secondary Education Act of 1965 (Public Law 89-10), as amended, authorizes Federal support to local educational agencies for special educational programs for educationally deprived children in attendance areas where low-income families are concentrated. Federal funds are allotted to State educational agencies who, in turn, sub-allot the funds to eligible local educational agencies.

To participate in the Title I program, school attendance areas must meet specific eligibility criteria which are stated in Title 45, Part 116, of the Code of Federal Regulations (CFR). These regulations which implement the Act stipulate that to be eligible an attendance area must have a high concentration of children from low-income families, expressed either in percentages or numbers, equal to or greater than the district average.

Our previous audit report on the State's administration of the Title I program, Audit Control Number 90067[illegible]2, issued March 31, 1969, covered the period September 23, 1965 to August 31, 1967. In recognition of the amendments to the Act, specifically Section 106, Statute of Limitations, in Public Law 93-380 (enacted August 21, 1974)

and our interest in administrative controls in recent years, we have confined our audit coverage in this report to the period September 1, 1970 to August 31, 1973.

During this period, ESEA Title I funds allotted to the New Jersey State Department of Education (SDE) aggregated $156,166,574. The funds sub-allotted to the Newark Board of Education during this period totalled $28,709,198, about 18.4 percent of the allotments to the State. For school year 1973-74, program funds amounting to $61.5 million were allotted to the State of which the Newark Board of Education received $11.2 million.

During the 1972-73 school year, Title I funds were used by the City to support reading, mathematics, and bilingual programs in which 25,996 children participated. The number of participants represented approximately 32 percent of the total pupil enrollment of about 80,000 children as of September 30, 1972 in levels ranging from kindergarten through grade 12.

Scope of Audit

Our audit was made in accordance with standards for governmental auditing. The principal objective was to determine the propriety and efficacy of the methods used by the Newark Board of Education, and approved by SDE, to select eligible school attendance areas. In this review, we examined project applications submitted for approval by Newark to SDE and any related documentary support for the school years 1970-71 through 1972-73.

HIGHLIGHTS OF AUDIT RESULTS

Our audit showed that the Newark Board of Education (BOE) used Title I funds totalling over $1.1 million in school years 1970-71 and 1971-72 in schools which did not meet the eligibility requirements of the Title I regulations. Essential source data in support of the 1970-71 eligibility determinations was not available. However, at least one school, based on the low-income percentages

shown on the application, was improperly classified as eligible to receive Title I funds. In 1971-72, by using incorrect ratios (resulting in part from incomplete low-income statistics) BOE misclassified 13 schools as eligible to receive Title I services.

More critical analysis by the State agency and BOE of the Title I applications for these years would have disclosed the need to validate the eligibility determinations and would have prevented the improper use of program funds. Although various conditions noted in these years did not recur and the City's eligibility determinations for school year 1972-73 were properly made, there was no documentary evidence from which we could determine whether these improvements stemmed directly from critical reviews by the State agency. (See Other Matters section of report, page 25.)

FINDINGS AND RECOMMENDATIONS

Selection of Target Areas

The Newark Board of Education (BOE) used Title I funds totalling over $1.1 million in school years 1970-71 and 1971-72 in schools which did not meet the eligibility requirements of the Title I regulations.[1] A critical review of the project applications for these years by BOE and State agency officials would have disclosed information gaps and a lack of detail on the methods used to determine eligibility of school attendance areas. Essential source data in support of the 1970-71 eligibility determinations was not available. However, at least one school, based on the low-income percentage shown in the application, was improperly classified as eligible for Title I support. In 1971-72, by using incorrect ratios (stemming in part from incomplete low-income statistics) BOE misclassified 13 schools as eligible to receive Title I serv-

[1] Title 45, Part 116, of the Code of Federal Regulations (CFR).

ices. In both years the ineligible schools were designated as project areas and used Title I funds. Eligibility determinations were properly made by BOE in school year 1972-73.

Provisions of Section 116.17, as amended November 28, 1968, set forth specific criteria as standards to determine the eligibility of school attendance areas to receive grant funds under the Title I program. Correct application of these criteria is the first step in the process to upgrade the education of educationally deprived children. The attendance areas which meet the eligibility requirements may or may not be included in Title I projects (and project areas) dependent on the number of educationally deprived children residing in these areas and their educational needs.

In citing the tenets to be observed in this process, the regulations mandated that Title I projects be established in attendance areas which have high concentrations of children from low-income families. Further elaborating on this basic requirement for attendance area eligibility, Section 116.17(d) stipulated that a school attendance area may be designated a project area ". . . if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district. . . ." This section also cited an alternative but analogous provision under which the designation may be made ". . . if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district." The regulations permitted an entire school district to be designated as a project area but only if there were slight differences in concentration of children from low-income families. Basically, these criteria have remained unchanged in successive revisions to the regulations.

In a separate directive (ESEA Title I Program Guide No. 44) to Chief State School Officers issued March 18, 1968, the Office of Education again placed special stress on the regulatory criteria for determining the eligibility of school attendance areas to participate in Title I projects. Section 1.1 of this directive defined an attendance area for the purposes of Title I as an area served by a public school and further stipulated: "For each such attendance area data must be secured on (a) the total number of children who according to their ages are eligible to attend the public school serving that area and (b) the number of such children who are from low-income families." Section 1.1 further defined the criterion for eligibility as follows: "In all cases the number of children considered eligible to attend a particular school consists of all children of the appropriate ages including children attending private schools and children who have dropped out of school."

The program guide suggested various income data sources as guidelines for arriving at attendance area eligibility determinations. It placed primary importance on two sources to ascertain the actual or estimated number of children from low-income families—the number of children in families receiving Aid to Families with Dependent Children or the children receiving free lunches. Housing, health, or employment statistics were also to be considered. The attendance areas were then to be ranked according to the percentage of children from low-income families or to the average number of such children unless there were no wide variations in the population sizes in the various attendance units. The directive also underscored a basic injunction: "Whatever data are used must be used uniformly throughout an applicant's district." In its Title I application for school year 1970-71, the City stated that it had considered eight sources of data, identified as criteria, in its determination of attendance area eligibility. Among these criteria, as enumerated in

paragraph 1.2 of Section II A of the application were the following:

"1.2.1 Statistics on Aid for Dependent Children supplied by the Essex County Welfare Board.

1.2.2 Free lunch and free breakfast programs

1.2.3 Model Cities statistics

1.2.4 Housing statistics"

However, the City did not retain this source data nor have available for our review an analysis of these statistics and information showing the weight given to each criterion in arriving at the determinations of attendance area eligibility. In the absence of this essential substantiation, we could not confirm the reliability of the district-wide percentage of low-income children, stated in the application as 25.5 percent, nor validate the low-income percentage computed for each attendance area. Therefore, we could not determine whether all 74 schools listed in the Title I application, involving 22,848 program participants, were actually eligible for Title I funds. But among the schools included in the application was one (Lafayette Street School) which showed a low-income percentage of 23.5, two full points below the district-wide average of 25.5. Since this school did not meet the prescribed low-income eligibility criteria, its eligibility designation was patently erroneous and its use of Title I funds was improper. For school year 1970-71 Title I funds used by this school totalled $91,266. Our further examination of Title I expenditures for school year 1970-71 showed that 10 additional schools, excluded from the application and therefore ineligible to receive Title I services, had used program funds Totalling $41,021.[1] This condition was not found in other years

[1] These schools included the following: West Kinney Street Junior High, Alexander Street, Ann Street, Chancellor Avenue, Cleveland, Garfield, Mount Vernon, Arts High School, Springfield Avenue, and Maple Avenue.

covered by our review. Responsible BOE officials agreed that these expenditures were improper but could not explain how they had avoided detection.

In determining the eligibility of attendance areas for school year 1971-72 BOE stated in the Title I application that it had considered eight sources of data (similar to those used in the prior year), but had settled on using one source, the statistics on Aid for Dependent Children (ADC) supplied by the Essex County Welfare Board. By using this source, BOE arrived at a district-wide low-income ratio of 33.9 percent. In comparison to the 74 selected attendance areas and 22,848 program participants in school year 1970-71, the application for 1971-72 indicated that the number of selected attendance areas and participating children had increased to 76 and 23,864, respectively.

We found that the method used by BOE to determine the eligibility of attendance areas for school year 1971-72 deviated from the specific instructions stated in Section 1.1 of Program Guide No. 44. As indicated earlier in this report, the determination of attendance area eligibility is dependent on the relationship between (a) the total number of children eligible to attend the public school serving the attendance area, including those attending private schools and those who had dropped out of school and (b) the number of such children from low-income families. This can be expressed in a ratio, as follows:

Ratio A

$$\frac{\text{Total Number of Children from Low-Income Families in School Attendance Area (Col. 3)}^{1}}{\text{Total Number of Children Considered Eligible to Attend a Particular School (Col. 2)}^{1}} = \text{Percentage of Children from Low-Income Families (Col. 4)}^{1}$$

[1] The columnar references correspond to the application format for school year 1971-72 established by the Office of Education.

BOE used this ratio to compute the district-wide low-income relationship of 33.9 percent (32,352 ADC children divided by the total school age children population of 95,780). However, in computing the individual attendance area low-income percentages BOE applied other ratios which did not show a direct correlation between the entire eligible school population in the school attendance area and that segment of the population representing children from low-income families. Contributing to this disparity was incomplete information in the ADC statistics on the number of low-income children in the individual school attendance areas.

The ADC statistics furnished by the Essex County Welfare Board listed the total number of children in the ADC category enrolled at each regular public elementary and secondary school. However, the statistics were incomplete since they excluded those children on ADC rolls attending private and special education schools [1] or who had dropped out of school. The limitations of the statistics therefore suggested to the IEA the use of an alternative ratio permitted in Program Guide No. 44 under certain conditions.

The program guide recognized that in some instances (as did not exist in Newark) schools may not have ". . . well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designed for those schools. . . ." In these cases, it may be necessary to use a different ratio, to base the ranking of the attendance areas for such schools on the ". . . . percentage or number of children from low-income families actually enrolled in those schools. . . ." This ratio under these circumstances is stated as shown below:

---

[1] Established for children with special handicaps, e.g. emotionally disturbed, mentally retarded but educable, deaf, etc.

Ratio B

$$\frac{\text{Total Number of Children from Low-Income Families Enrolled in a Specified School}}{\text{Total Enrollment in Specific School}} = \text{Percentage of Children from Low-Income Families}$$

As previously indicated, Ratio B was not applicable to Newark since the City had well-defined attendance areas. BOE nevertheless attempted to use it because the incompleteness of the ADC statistics left no other reasonable approach. While the ratio was not permitted to be used by BOE under Program Guide No. 44 criteria, it was a reasonable alternative under the circumstances. However, in its attempt BOE devised hybrid ratios which deviated from the method specified in the program guide. The results were unacceptable since there was no direct relationships between the component elements.

For each public elementary school, BOE included in the numerator [1] the number of ADC children enrolled in that school as well as the total number of ADC children residing in the school attendance area who were enrolled in junior and senior high schools. However, BOE limited the data in the denominator [2] to the total enrollment of the elementary school. There was therefore no meaningful relationship between the data shown in the ratio, namely the total ADC statistics for the attendance area and the elementary school enrollment. Lacking this correlation, the ratio had basic mathematical flaws which tended to inflate the low-income percentage for individual elementary school areas and thus to increase improperly the number of eligible attendance areas. The distortion is illustrated in the calculation of the low-income percentage for Madison Street School:

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[1] Column 3 in application format for school year 1971-72 captioned: All Schools in the District Ranked by Percentage of Children from Low-Income Families.

[2] Column 2 in application format described in note [1].

No. of ADC children enrolled in Madison Street School in statistics furnished by the Essex County Welfare Board	445 (A)
No. of ADC children residing in Madison Street School attendance area enrolled in junior and senior high schools	380 (B)
No. of ADC children residing in Madison Street School attendance area enrolled in other schools, e.g. schools for the handicapped	112 (C)
Total No. of low-income children shown in application	937 (D)
Total pupil enrollment in Madison Street School	1544 (E)

Calculation of low-income percentage:

$$\frac{\text{No. of low-income children shown in application (937)}}{\text{Total pupil enrollment in Madison Street School (1544)}} = 60.6\%$$

The limitations of the available data prevented us from recalculating the low-income percentages for individual elementary school areas in accordance with the criteria mandated by OE. Therefore, in our recalculations we followed the reasonable alternative offered in Ratio B. As shown below, we considered only related data, as stated in Ratio B, namely the number of ADC children enrolled in Madison Street School (Item A) and the total pupil enrollment at the school (Item E). This recalculation (445÷1544) showed that the actual low-income ratio for Madison Street School was 28.8 percent, substantially below the district-wide average of 33.9 In recalculating the ratios of the 41 elementary schools presented as eligible in the Title I application we found that 10 schools had low-income ratios lower than the district-wide average and were thus ineligible for Title I funding. Data pertaining to these 10 schools is shown in the following tabulation.

Computation of Low-income Percentages for 10 Elementary Schools (Chart A)

School	Total Number of Low-income Children: Shown in Application	Total Number of Low-income Children: Enrolled at School	Total Number of Children Enrolled at School	Low-income Percentages: Shown in Application Col B ÷ Col D	Low-income Percentages: Computed Auditor Col C ÷ Col E
(Col A)	(Col B)	(Col C)	(Col D)	(Col E)	(Col F)
Madison	937	445	1544	60.6	28.8
Newton St.	446	256	812	54.9	31.5
So. 17th St.	823	519	1549	53.1	33.5
Central Ave.	314	174	592	53.0	29.4
Burnet St.	388	231	766	50.6	30.2
Waverly Ave.	299	191	599	49.9	31.9
Franklin	519	361	1115	46.5	32.4
M. Garvey	603	298	1304	46.2	22.9
Garfield	427	253	1229	34.7	20.6
Hawkins	414	361	1192	34.7	30.3

BOE used a different method to compute the low-income percentages for junior and senior high schools. In this second method to determine the eligibility of secondary schools, BOE added the low-income percentages of the pipeline or feeder elementary schools shown in the Title I application and arrived at an average, as illustrated below for Weequahic High School:

Feeder Elementary School	Low-income Percentage Shown in Application [1]
Bragaw Avenue School	48.4%
Chancellor Avenue School	20.5 [2]
Hawthorne Avenue School	44.0
Maple Avenue School	25.7 [2]
Peshine Avenue School	49.1
Total of low-income percentages	187.7%
Average low-income percentage 187.7% ÷ 5 =	37.5%

[1] Based on our use of Ratio B, the individual feeder elementary school percentages were recomputed respectively as 39.8%, 11.9%, 17.2%, and 40.5%.

[2] These schools had low-income percentages below the district-wide average of 33.9% and were therefore ineligible for I funding

Since the low-income percentages for these individual elementary schools were inflated as described earlier in this report, the resultant averages based on these percentages were similarly inflated.

The method was improper not only because it produced low-income percentage distortions but also because it was not authorized by the attendance area eligibility criteria discussed earlier in this report. Further, it was inconsistent with the method used to determine the eligibility of elementary schools. The use of dual approaches (population totals for elementary schools and averaged percentages for secondary schools) is specifically prohibited by the injunction in Program Guide No. 44 that data in attendance area eligibility determinations ". . . be used uniformly throughout an applicant's district."

In our recomputations of the low-income percentage for the 10 junior and senior high schools shown as eligible in the Title I application we used the same related information (Ratio B) that we had employed in our elementary school calculations i.e., the number of ADC children at each school and the total school enrollment. We found, as shown in the following tabulation, that three of these schools had low-income percentages below the district-wide average of 33.9 percent and therefore were not eligible to use Title I funds.

Computation of low-income Percentages for 3 Secondary Schools (Chart B)

School	Total Number of low-income Children Enrolled at School	Total Number of Children Enrolled at School	Low-income Percentage	
			Shown in Application	Computed by Auditor Col B ÷ Col C
(Col A)	(Col B)	(Col C)	(Col D)	Col E)
Clinton Pl. Jr. H.S.	491	1529	69.5	32.1
Weequahic H.S.	690	2470	37.5	27.9
East Side H.S.	264	2023	35.0	13.0

Since the schools listed in charts A and B did not meet the eligibility requirements of the Title I criteria, they were not authorized to receive grant funds under the Title I program. Title I expenditures made by these schools for school year 1971-72, totalling $1,029,630, were unallowable. The expenditures applicable to each school, rounded off to the nearest dollar, are summarized in the following chart.

Expenditures by Ineligible Schools for School Year 1971-72 (Chart C)

School	Expenditures		
	Salaries	Other Expenses	Total
Madison	$ 92,225	$ 11,525	$ 103,750
Newton Street	63,419	6,044	69,463
So. 17th Street	91,154	13,688	104,842
Central Avenue	56,225	5,307	61,532
Burnet Street	50,128	5,879	56,007
Waverly Avenue	51,651	5,014	56,665
Franklin	107,522	7,705	115,227
Marcus Garvey	102,438	17,049	119,487
Garfield	70,104	11,872	81,976
Hawkins	89,057	13,746	102,803
Clinton Pl. Jr. High	45,407	12,807	58,214
Weequahic High	40,402	12,882	53,284
East Side High	33,498	12,882	46,380
Total Unallowable Expenditures	$893,230	$136,400	$1,029,630

To recapitulate, the city's claims for school years 1970-71 and 1971-72 included unallowable expenditures of at least $1,161,917, as summarized below:

School Year 1970-71		
Expenditures by ineligible school (Lafayette) shown as eligible in application	$91,266	
Expenditures by 10 ineligible schools excluded from application	41,021	
Total unallowable expenditures		$ 132,287
School Year 1971-72		
Total unallowable expenditures-Chart C		1,029,630
Total unallowable expenditures 1970-71 and 1971-72		$1,161,917

During the audit we alerted the City to the impropriety of the ratios used to determine attendance area eligibility and sought an explanation for their usage. BOE's Central Office Coordinator for the Title I program agreed that the ratios used were incorrect and tended to inflate the low-income percentages. He ascribed the incorrect method to the lack of mathematical expertise of the individual responsible for preparing that part of the application. Further, he believed that this employee misconceived the criteria stated in Program Guide No. 44.

We found that the low-income percentages computed for school year 1972-73 were proper and were based on more precise information. The Essex County Welfare Board had furnished BOE with a list showing the name and address of each child, age 5-17, in the ADC category. BOE converted this data into attendance area statistics. Thus, BOE had available for the first time statistics indicating the total number of children from low-income families residing in the school attendance area, inclusive of drop-outs and attendees at public, non-public and special education schools.

There was no documentary evidence from which we could determine whether this improvement in the quality of the City's low-income information and the non-recurrence in succeeding years of various conditions in 1970-71 and 1971-72, discussed earlier in this report, resulted from critical reviews by the State educational agency (New Jersey State Department of Education—SDE). A thorough review of the 1970-71 application by SDE would have disclosed the ineligibility of Lafayette Street School to receive Title I program funds. Further, the City's use of eight sources of information in 1970-71 to determine the number of children from low-income families should have prompted SDE to request a written analysis showing how these various data sources had been used in arriving at the district-wide and individual attendance area low-income percentages.

Similarly, close review of the following year's application (1971-72) by SDE would have detected major gaps in the information relating to the selection of project area schools and triggered a request to the City to resolve the questions raised by SDE prior to application approval. For example, the application includes a brief description of the method used to determine the eligibility of secondary schools but offers no similar commentary on elementary schools. The omission is significant since the calculation for secondary schools involved averaging the low-income percentages of feeder elementary schools, as previously discussed in this report. If SDE had requested a description and an illustration of the method used in arriving at the elementary school percentages, SDE would have detected the basic flaws in the method and would have averted the improper use of over $1 million of Title I funds for the 13 elementary and secondary schools, as shown in Charts A, B and C. Further, if the methodology supporting the secondary school computations had been requested by SDE, the State would have learned, as previously illustrated by us, that the computations included ineligible as well as eligible elementary schools.

Another significant information gap pertained to the rationale for selection of the low-income information source used by BOE in arriving at its eligibility determinations. BOE stated in the application that it had considered eight sources of information before selecting the ADC statistics supplied by the Essex County Welfare Board. Among these low-income data sources were separate statistics relating to housing, Model Cities, free lunch and free breakfast, health, etc. The number of children from low-income families determined by these statistics was shown for only three sources: housing (33,011); free lunch and free breakfast (32,865); and ADC (32,352). Except for stating that these various sources had been considered, BOE did not set forth the criteria it had used in its consideration nor the rationale

for selection of the ADC data. SDE should have requested this information to make certain that the most appropriate data had been used. System weaknesses disclosed in these replies would have suggested to SDE the need for a special on-site audit to confirm the accuracy of reported data and to recommend system improvements.

Recommendations

We recommend that:

1. Arrangements be made to return to the Office of Education those Federal funds, totalling $1,161,917, which were used by ineligible school attendance areas in school years 1970-71 and 1971-72.

2. Steps be taken to develop and implement controls to prevent improper uses of ESEA Title I funds in the future. These controls should prescribe a comprehensive review by responsible officials of the data sources and methods used to determine attendance area eligibility. Where significant discrepancies or patterns of system weaknesses are disclosed in these reviews, special on site examinations should be made to confirm the accuracy of the data and the propriety of the methods.

The State Agency Comments

The State agency's reply to this finding indicated nonconcurrence in our conclusions and recommendations. In support of its narrative comments, the State agency (State Department of Education—SDE) submitted various exhibits which we have marked for ease of reference as Exhibits A to E. We are setting forth verbatim, as follows, SDE's comments on each audit exception category. SDE's complete reply inclusive of the related exhibits is incorporated in this report (page 26) under Appendix A.

"Lafayette Street School

The Draft Audit Report states that Lafayette Street School was ineligible for Title I funds for the school year 1970-71 because its concentration of children from low income families (23.5%) was below the districtwide average (25.5%). Upon re-examination, we find that the low income percentage for Lafayette School was incorrectly stated in the 1970-71 application. The percent should have been stated as 41.4%. Enclosed in support is data from the 1970 census report.

"Expenditures for Non-Title I Schools

Our review of the Newark expenditures for 1970-71 does not indicate that Title I funds were allocated to non-Title I schools. I have enclosed for your examination a section of the fiscal year 1971 audit report for Newark. As you will note, the report indicates (item 2) that allocations were made only against approved projects. I have also included for your review the Title I Budget Distribution for 1970-71 which indicates that funds were not scheduled for any of the schools in question.

"Non-Eligibility of 10 schools listed in the 1971-72 Title I Application.

Your report indicated that auditors recalculated the eligibility of ten schools and found them to be below districtwide low income average. It is clear from the information included that only AFDC data was used in the recalculation. The Newark application specifically indicated that a number of data sources, in addition to AFDC, were used. They were Housing Statistics, Model Cities Statistics, Free Lunch and Breakfast Statistics, Incidents of Foreign Born and Non-English Speaking Students, Health Statistics, Unemployment and Underemployed Sta-

tistics. Page 4b of that application is included for your review.

We concur that there were 445 children identified as AFDC in the Madison Attendance area. These were but a portion of the total low income population which is more accurately reflected by the average daily free lunch attendance (919) for the Madison School. I have included free lunch data for the Madison School.

The situation referred to above applies to the cited secondary schools, also. Although Clinton Place Junior High School identified only 491 students from AFDC data, these children were a part of a total of 1,032 low income children residing in the attendance area. I have again attached free lunch data. It is our contention that if auditors had considered data other than AFDC, they would have determined that each of the 10 schools cited was eligible as listed.

Department Staff has undertaken to provide accurate responses to what we consider serious allegations. In each case, schools of the district in question have been visited. It is our conclusion that poverty during the period in question was so widespread that there were a few schools truly ineligible. The district did attempt to follow regulations in the development and provision of services. In the process they may not have been as definitive as some of us would require. Nevertheless, I am assured that their actions were consistent with the applicable laws and regulations."

Our comments on the SDE position, keyed to the above headings, are presented below:

Lafayette Street School

SDE's comments indicate that careful examination of all data sources used in the determination of attendance area eligibility would have disclosed that the low-income percentage for Lafayette Street School was incorrectly stated. In support of this statement SDE submitted ". . . data from the 1970 census report . . . ." The SDE position is not valid since the 1970 census data report was not one of the eight sources identified in the application as those used to determine attendance area eligibility.

In its Title I application for school year 1970-71, BOE stated that it had determined attendance area eligibility ". . . on the basis of the best available information . . . ." BOE had pointed out in a special note in the application that the 1970 census data was not then available. Accordingly, SDE's comment that the low-income percentage for Lafayette Street School, as supported by the 1970 census data, should have been stated as 41.4 is not valid.

If this comment infers that the later availability of the 1970 census data showed the need to recalculate the low-income percentage for Lafayette, the requirement would also have been applicable to *all other* schools and would have produced a revised district-wide average. The City would have had to submit an amended application to SDE, showing the revised calculations and identifying the information sources which had been used. Since an amended application was not submitted to SDE for approval, the data shown in the original application must have been considered valid.

Expenditures for Non-Title I Schools

We agree with the statements by SDE that Title I funds ". . . were not scheduled for any of the schools in question . . . ." Exhibit C, showing the planned budget distribution for school year 1970-71, omits these schools. Our finding did not state that these schools were im-

properly included in the budget. Rather, it pointed out that these schools used Title I funds even though they had been excluded from the application and were therefore ineligible to receive Title I services.

Our analysis of expenditures showed that Title I funds had in fact been expended at these schools. This was authenticated by our comparison of financial data as shown in BOE's Budget Status Report which listed these school expenditures and as shown in the final project expenditures report submitted to SDE. The comparison follows:

	Totals Shown in		
	Budget Status Report	Report of Expenditures	Difference
Approved Project Amount	$9,046,097	$9,046,097	$ —0—
Total Funds Expended	$8,105,308	$8,105,308	$ —0—
Total Funds Committed *	312,330	312,330	—0—
Total Funds Expended and Committed	$8,417,638	$8,417,638	$ —0—
Total Carry-Over to Fiscal Year 1972	$ 628,459	$ 628,459	$ —0—

* Committed funds represent encumbrances

The City presented expenditures and encumbrances in the Budget Status Report in two breakouts: by line item; and by object code, e.g., salaries, textbooks, etc. for each school. Line item totals shown in the annual Report of Expenditures (ESEA Forms 1 and 2) to SDE were derived from the Budget Status Report. Since the reports were in agreement, it is apparent that the expenditures for the 10 ineligible schools, as shown in the Budget Status Report, were also included by line item in the annual Report of Expenditures.

Our analysis of the Budget Status Report indicated that Title I funds used by these 10 schools, included in the expenditures total shown above, were expended for salaries ($40,950) and other costs ($71).

Non-Eligibility of 10 Schools Listed in the 1971-72 Title I Application

We do not agree with the SDE position that our calculations of attendance area eligibility are invalid because they were based on AFDC statistics. SDE's exception is based on the grounds that we had not considered various other sources of data which the City had carefully examined and had used, in addition to the AFDC statistics, in arriving at its eligibility determinations. In support of its statement that these various sources had been used and their use specifically indicated in the application, SDE submitted with its reply page 4b of the application The statements on this attachment (Exhibit D) contradict the position advanced by SDE.

The part of the application submitted by SDE is particularly important since in it the City states the method used in selecting attendance areas for Title I projects. As previously discussed in the finding, the City clearly certified in this part of the application that after examination of eight sources of data it had settled on one. Page 4b of the application stated the decision as follows: "The criterion used in qualifying schools was based on statistics on Aid for Dependent Children supplied by the Essex County Welfare Board." The seven data sources which had been examined but *not* selected for use in determining attendance area eligibility included, as shown on page 4b, housing statistics, free lunch and free breakfast statistics, and other low-income indicators.

As demonstrated in the finding, in the illustration for Madison Street School and in the various computations shown under Chart A, BOE based its low-income percentages exclusively on AFDC data. We had no valid basis to use for our audit determinations on information criterion other than the one selected by the City and approved by SDE. Our audit finding was not concerned so much with the data source selected for use as with the way the data was used. In this context, the SDE reply

did not comment on the basic flaw in BOE's eligibility determinations described in the audit report, namely the use of mathematically unacceptable ratios for computing low-income eligibility.

SDE's statement that ". . . there were 445 children identified as AFDC in the Madison attendance area . . ." misreads the data presented in the illustrative computation for Madison Street School. The basic mathematical flaws in the ratio used by BOE, as shown in our illustrative recomputation for Madison Street School, warranted recognition by SDE. As shown in the audit report, these 445 children represented only those AFDC children attending Madison Street School and did not include other AFDC children in the Madison Street School attendance area who according to their ages were eligible to attend the school but were enrolled in other schools, e.g. schools for the handicapped.

We do not question SDE's assertion that during the period covered by our audit poverty was widespread in the district. This incidence of poverty therefore necessitated closer attention to the calculation of low-income percentages to insure use of Title I funds in eligible low-income attendance areas with the greatest concentrations of educationally disadvantaged children.

OTHER MATTERS

During the discussion of audit results at the exit conference, the Commissioner of Education notified us that the State agency's application review procedures relating to selection of target areas had been strengthened after the period covered by our audit. As substantiation, he later forwarded to us, for our review, copies of the State agency's Guidelines for Approval of ESEA Title I Program Application for fiscal years 1974 and 1975, respectively. We found these documents to be generally similar to those issued in earlier years and without clear evidence that the quality of the State agency review had improved.

APPENDIX A

[SEAL]

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
225 West State Street
Trenton, N.J.

Office of the Commissioner

December 10, 1974

Mr. Bernard Luger
Regional Audit Director
Department of Health, Education
and Welfare
26 Federal Plaza
New York, New York 10007

Dear Mr. Luger:

This acknowledges receipt of the HEW Audit Report of Title I ESEA for the period September 1, 1970 to August 31, 1973.

For purposes of response I have grouped audit exceptions by fiscal year, categories as indicated in your report, audit exception amounts and page numbers. They are:

Fiscal Year 1971—Lafayette Street School ($91,266) page 7.

Fiscal Year 1971—EXPENDITURES FOR NON TITLE I SCHOOLS ($41,021) page 8

Fiscal Year 1972—Non eligibility of 10 schools listed in 1971-1972 application ($1,029,630) pages 9-18

Lafayette Street School

The Draft Audit Report states that Lafayette Street School was ineligible for Title I funds for the school year 1970-71 because its concentration of children from low

income families (23.5%) was below the districtwide average (25.5%). Upon reexamination, we find that the low income percentage for Lafayette School was incorrectly stated in the 1970-71 application. The percent should have been stated as 41.4%. Enclosed in support is data from the 1970 census report. (Exhibit A)[1]

Expenditures for Non-Title I Schools

Our review of the Newark expenditures for 1970-71 does not indicate that Title I funds were allocated to non-Title I schools. I have enclosed for your examination a section of the fiscal year 1971 audit report for Newark. As you will note, the report indicates (item 2) that allocations were made only against approved projects. I have also included for your review the Title I Budget Distribution for 1970-71 which indicates that funds were not scheduled for any of the schools in question. (Exhibits B and C)[1]

Non-Eligibility of 10 schools listed in the 1971-72 Title I Application.

Your report indicated that auditors recalculated the eligibility of ten schools and found them to be below districtwide low income average. It is clear from the information included that only AFDC data was used in the recalculation. The Newark application specifically indicated that a number of data sources, in addition to AFDC, were used. They were Housing Statistics, Model Cities Statistics, Free Lunch and Breakfast Statistics, Incidents of Foreign Born and Non-English Speaking Students, Health Statistics, Unemployment and Underemployed Statistics. Page 4b of that application is included for your review. (Exhibit D)[1]

We concur that there were 445 children identified as AFDC in the Madison attendance area. These were but

[1] Exhibit identification shown by HEW Audit Agency to facilitate reference.

a portion of the total low income population which is more accurately reflected by the average daily free lunch attendance (919) for the Madison School. I have included free lunch data for the Madison School. (Exhibit E)[1]

The situation referred to above applies to the cited secondary schools, also. Although Clinton Place Junior High School identified only 491 students from AFDC data, these children were a part of a total of 1,032 low income children residing in the attendance area. I have again attached free lunch data. It is our contention that if auditors had considered data other than AFDC, they would have determined that each of the 10 schools cited was eligible as listed.

Department Staff has undertaken to provide accurate responses to what we consider serious allegations. In each case, schools of the district in question have been visited. It is our conclusion that poverty during the period in question was so widespread that there were a few schools truly ineligible. The district did attempt to follow regulations in the development and provision of services. In the process they may not have been as definitive as some of us would require. Nevertheless, I am assured that their actions were consistent with the applicable laws and regulations.

Sincerely yours,

/s/ Fred G. Burke
FRED G. BURKE
Commissioner of Education

EXHIBIT A

LEGEND

A. ESTIMATED NUMBER OF ELEMENTARY SCHOOL-AGE CHILDREN (5-13)
B. ESTIMATED NUMBER OF DISADVANTAGED ELEMENTARY SCHOOL-AGE CHILDREN (5-13)
C. PERCENTAGE OF ELEMENTARY SCHOOL-AGE CHILDREN (5-13) WHO ARE DISADVANTAGED
D. SCHOOL RANK - NUMBER OF DISADVANTAGED CHILDREN
E. SCHOOL RANK - PERCENTAGE OF DISADVANTAGED CHILDREN
F. TOTAL NUMBER OF NON-WHITE ELEMENTARY SCHOOL-AGE CHILDREN (5-13)
G. TOTAL NUMBER OF PRE-SCHOOL AGE CHILDREN (UNDER 5)
H. TOTAL NUMBER OF SCHOOL-AGE CHILDREN (5-17)
I. SCHOOL GROWTH INDEX (G/H)
J. TOTAL ATTENDANCE AREA POPULATION
K. NON-WHITE PERCENTAGE OF TOTAL POPULATION
L. AVERAGE NUMBER OF PERSONS PER HOUSEHOLD
M. PERCENTAGE OF CHILDREN UNDER 18 NOT LIVING WITH MALE PARENT

	SCHOOL NAME	A	B	C	D	E	F	G	H	I	J	K	L	M
11	ABINGTON AVE	962	390	40.5	31	29	225	532	1436	0.4	7742	16.5	2.43	22.6
101	BROADWAY-BROADWAY JR	1649	668	40.5	12	21	1123	903	2278	0.4	6920	60.9	3.52	38.5
111	SUMMIT STREET	1527	746	48.9	6	6	931	922	2069	0.4	8291	50.6	2.65	40.9
121	CAMDEN ST-WEST KINNEY JR	1238	562	45.4	17	15	1133	713	1655	0.4	4642	92.7	3.75	46.6
131	CENTRAL AVE	913	445	48.2	25	7	625	439	1345	0.3	3787	66.0	3.64	34.7
141	CHANCELLOR AVE	2330	356	17.5	37	45	1800	1123	2728	0.4	10445	81.8	3.31	24.6
151	CHARLTON STREET	625	290	45.8	42	15	600	364	855	0.4	3409	95.7	2.67	41.4
171	CHRISTOPER COLUMBUS	925	163	17.6	48	44	124	569	1332	0.4	7171	9.1	2.91	13.9
181	CLEVELAND-WEST KINNEY JR	1266	616	48.6	14	9	1257	723	1749	0.4	4336	97.8	3.44	54.4
21	ALEXANDER STREET	1232	162	14.8	45	47	96	605	1807	0.3	8763	5.8	3.04	13.3
201	DAYTON STREET	1382	760	55.4	6	3	867	695	1848	0.4	7031	52.4	2.56	34.6
211	EIGHTEENTH AVE-WEST KINNEY JR	256	140	54.6	49	2	253	116	342	0.3	997	97.5	3.22	52.4
221	ELLICTT ST-BROADWAY JR	1456	322	22.4	39	42	155	806	2047	0.4	9928	11.4	2.73	20.2
231	FIFTEENTH AVE-SOUTH 7TH ST	1405	459	32.6	23	23	1255	899	1843	0.5	5421	90.8	3.79	52.8
241	FOURTEENTH AVE	719	299	41.6	41	18	637	423	951	0.4	2690	88.3	3.78	49.0
251	FRANKLIN-WEBSTER JR	2090	779	37.3	7	25	625	1336	2945	0.5	12273	24.0	3.10	28.7
261	GARFIELD	1506	362	24.0	35	39	665	941	2133	0.4	9614	30.1	2.99	26.4
271	TUBMAN-HARVEY	1269	466	36.5	20	23	1179	742	1632	0.4	4832	92.3	3.81	47.4
281	HAWKINS ST	1552	734	47.3	9	12	505	786	2157	0.4	7254	26.1	3.30	26.3
291	HAWTHORNE AVE	1760	374	21.3	33	43	1655	943	2401	0.4	8136	92.9	3.66	37.6
31	ANN STREET	1428	439	30.7	26	33	16	706	2144	0.3	10341	0.9	3.11	7.3
301	LAFAYETTE STREET	1396	572	41.2	16	19	185	748	2042	0.4	9423	10.8	3.21	11.4
311	LINCOLN	1575	231	14.7	44	49	21	691	2387	0.3	11750	1.0	3.00	9.1
321	MADISON-HUDSON-SOUTH 7TH AVE JR	2540	641	25.2	13	31	2420	1200	3455	0.3	11406	91.8	3.52	32.9
331	MAPLE AVE	2371	351	14.8	38	46	2213	1506	3694	0.4	13456	85.2	3.17	24.2
41	AVON AVE-CLINTON PL JR	1501	549	36.6	15	26	1448	992	2016	0.5	6424	96.7	3.68	44.7

"ESTIMATED DISADVANTAGED CHILDREN" IS THE NUMBER OF CHILDREN LIVING IN CROWDED HOUSING AVERAGED WITH THE NUMBER LIVING IN LOW RENT (UNDER $ 60/MONTH) AND LOW VALUE (UNDER $10000) HOUSING.

PRODUCED BY APPLIED URBANETICS, INC., WASHINGTON, D.C.

EXHIBIT B

ELEMENTARY AND SECONDARY EDUCATION ACT (P.L. 89-10) PROGRAMS

The records submitted to us disclosed that:

1. Obligations reported were incurred during the fiscal year or project period for which the project was approved and, upon liquidation, were properly adjusted.
2. All obligations made for Federally supported Elementary and Secondary Education Act projects were made against approved projects.
3. Costs, such as salaries, travel, etc., were correctly prorated.

Examination of records was made in accordance with minimum audit requirements set forth by the State Department of Education on Elementary and Secondary Education Act operations.

The Elementary and Secondary Education Act financial exhibits contained herein (Exhibits A-14 through A-18) represent a true statement of the financial position pertaining to projects under Titles I, II, VIA and VIB of the Elementary and Secondary Education Act of 1965, P.L. 89-10.

During the year, the Board was allocated $9,589,400.00 of Federal funds for special education programs for educationally deprived children as follows:

	Title I	Title II	Title VI-A	Title VI-B	Total
Federal funds	$9,400,360.00	$102,780.00	$10,550.00	$75,710.00	$9,589,400.00
Cash Advanced to June 30, 1971	6,645,062.00	102,780.00	--	26,000.00	6,773,842.00
Receivable at June 30, 1971	$2,755,298.00	$ --	$10,550.00	$49,710.00	$2,815,558.00

Expenditures amounted to $8,958,548.68 and are classified as follows:

	Budget	Expenditures	Balance
Administration	$ 250,077.00	$ 113,529.69	$136,547.31
Instruction	5,693,152.00	5,573,429.06	119,722.94
Attendance and Health Services	453,604.91	452,698.35	906.56
Transportation	146,981.00	140,907.50	6,073.50
Operation of Plant	48,284.00	41,499.93	6,784.07
Maintenance of Plant	110,114.80	102,326.35	7,788.45
Fixed Charges	844,754.00	685,439.76	159,314.24
Food Services	121,100.00	119,242.45	1,857.55
Community Services and Civic Activities	1,790,537.29	1,610,083.78	180,453.51
Capital Outlay	130,795.00	119,391.81	11,403.19
	$9,589,400.00	$8,958,548.68	$630,851.32

EXHIBIT B-1

1. The detail of the individual accounts comprising the opening balances of the Tuition Receivable Account at July 1, 1970 did not agree with the prior year's audit report in the amount of $778.00.

   We recommend that this difference be reconciled and the necessary adjustments recorded.

2. At June 30, 1971, there was $9,777,625.00 due from the City of Newark representing the balance of the proceeds of a bond sale in March 1971.

   We recommend that proceeds from the sale of bonds be promptly deposited with the Custodian of School Moneys in accordance with R.S. 18:24-47.

IMPROVEMENT AUTHORIZATIONS

1. At June 30, 1971, there were unfunded deferred charges of $755,00.00 representing improvement authorizations that were recorded by the Board before bond ordinances were adopted by the Municipal Council.

   We recommend that improvement authorizations be recorded after the adoption of bond ordinances by the Municipal Council and that no disbursements be made until such time.

FEDERAL PROJECTS

1. During our examination of expenditures for Federal programs, we determined that not all reports requesting reimbursement for these expenditures were filed on a timely basis.

   We recommend that reports requesting reimbursement from Federal agencies be filed on a timely basis in order to minimize delays in collection.

ELEMENTARY AND SECONDARY EDUCATION ACT 1965

1. During our audit of the Elementary and Secondary Education Act funds, we noted there are receivables of $137,763.64 for the 1968-1969 program that are disputed by the Federal Government.

   If the claim for the receivable is denied by the Government, we recommend that the balance be cancelled by the Board by resolution.

2. At June 30, 1971, the Board did not issue a blanket order for program expenditures for the period July 1, 1971 to August 31, 1971 as required under the Act for those programs ending August 31, 1971.

   We recommend that the Board comply with the Act.

-10- K/106 1/216

EXPENDITURES FOR 4-TITLE I SCHOOLS

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

EXHIBIT C

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

ELEMENTARY SCHOOLS	B.R.L. Programmed Reading 02240007	Participating Students 02120006	Project Coordinator 02120006	Project/Dem. Development Teachers 02130001	Substitutes 1/10 @ $35 02130001	Clerk Steno 02150101	Teacher Aides ½ Ea.-Kdg. ½ Ea. 1st Gr. 02160003	Community Aides @ $6/P.S. 02160009	Textbooks @ $6/P.S. 02200001	Instructional Sup. @ $6/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500109	E.E.E. Activities @ $3/P.S. 02500121	Transportation @ $4/P.S. 05200105	Telephone Base $100 06411401	New Equipment @ $1/P.S. 12600101	Totals
			No. Amt.	No. Amt.	No. Amt.	No. Amt.	No. Amt.	No. Amt.								
Abington Avenue		298	1 $ 14,450	2 $ 25,670	30 $ 1,050	1 $ 5,005	2 $ 6,106	1 $ 3,053	$ 1,788	$ 1,788	$ 298	$ 1,192	$ 1,192	$ 125	$ 298	$ 62,0
Avon Avenue		413	1 14,450	2 25,670	41 1,435	1 5,005	6 18,318	1 3,053	2,478	2,478	413	1,652	1,652	150	413	77,2
Belmont-Runyon		340	1 14,450	2 25,670	34 1,190	1 5,005	8 24,424	1 3,053	2,040	2,040	340	1,360	1,360	125	340	81,4
Bergen Street		524	1 14,450	3 38,505	52 1,820	1 5,005	8 24,424	1 3,053	3,144	3,144	524	2,096	2,096	150	524	99,0
Bragaw Avenue		580	1 14,450	3 38,505	58 2,030	1 5,005	6 18,318	1 3,053	3,480	3,480	580	2,320	2,320	150	580	94,3
Broadway Elementary	I	306	1 14,450	2 25,670	31 1,085	1 5,005	6 18,318	1 3,053	1,836	1,836	306	1,224	1,224	125	306	74,5
Burnet Street	I	294	1 14,450	2 25,670	29 1,015	1 5,005	4 12,212	1 3,053	1,764	1,764	294	1,176	1,176	125	294	68,0
Camden Street		515	1 14,450	3 38,505	52 1,820	1 5,005	15 45,795	1 3,053	3,090	3,090	515	2,060	2,060	150	515	120,1
Central Avenue		227	1 14,450	2 25,670	23 805	1 5,005	3 9,159	1 3,053	1,362	1,362	227	908	908	125	227	63,3
Charlton Street	I	413	1 14,450	2 25,670	41 1,435	1 5,005	6 18,318	1 3,053	2,478	2,478	413	1,652	1,652	150	413	77,2
Clinton Avenue	I	246	1 14,450	2 25,670	25 875	1 5,005	7 21,371	1 3,053	1,476	1,476	246	984	984	125	246	76,0
Dayton Street		374	1 14,450	3 38,505	37 1,295	1 5,005	7 21,371	1 3,053	2,244	2,244	374	1,496	1,496	125	374	82,1
Eighteenth Avenue		337	1 14,450	2 25,670	34 1,190	1 5,005	6 18,318	1 3,053	2,022	2,022	337	1,348	1,348	125	337	75,2
Fifteenth Avenue	555	555	1 14,450	3 38,505	50 1,750	1 5,005	11 33,583	1 3,053	2,970	2,970	495	1,980	1,980	150	495	107,4
Fourteenth Avenue		365	1 14,450	2 25,670	39 1,365	1 5,005	5 15,265	1 3,053	2,310	2,310	385	1,540	1,540	125	385	73,1
Franklin		279	1 14,450	2 25,670	28 980	1 5,005	5 15,265	1 3,053	1,674	1,674	279	1,116	1,116	125	279	70,8
Hawkins		360	1 14,450	2 25,670	36 1,260	1 5,005	6 18,318	1 3,053	2,160	2,160	360	1,440	1,440	125	360	76,8
Hawthorne Avenue		562	1 14,450	3 38,505	56 1,960	1 5,005	6 18,318	1 3,053	3,372	3,372	562	2,248	2,248	150	562	93,1
Hudson Street		149	½ 7,225	½ 6,418	15 525	1 5,005	-	1 3,053	894	894	149	596	596	100	149	25,0
Lafayette Street		440	1 14,450	2 25,670	44 1,540	1 5,005	6 18,318	1 3,053	2,640	2,640	440	1,760	1,760	150	440	77,0
Madison Annex		85	½ 7,225	½ 6,418	9 315	1 5,005	9 27,477	½ 1,527	510	510	85	340	340	100	85	[illegible]
Madison Avenue 151		444	1 14,450	3 38,505	44 1,540	½ 5,005	-	½ 1,526	2,664	2,664	444	1,776	1,776	150	444	[illegible]
McKinley		303	1 14,450	3 38,505	30 1,050	1 5,005	10 30,530	1 3,053	1,818	1,818	303	1,212	1,212	125	303	99,
Miller Street		535	1 14,450	3 38,505	59 2,065	1 5,005	9 27,477	1 3,053	3,510	3,510	585	2,340	2,340	150	585	103,
Morton Street		440	1 14,450	2 25,670	41 1,435	1 5,005	4 12,212	1 3,053	2,640	2,640	440	1,760	1,760	150	440	71,
Newton Street	I	307	1 14,450	2 25,670	31 1,085	1 5,005	4 12,212	1 3,053	1,842	1,842	307	1,228	1,228	125	307	65,
Oliver Street		259	1 14,450	2 25,670	26 910	1 5,005	4 12,212	1 3,053	1,554	1,554	259	1,036	1,036	125	259	67,
Peshine Avenue		610	1 14,450	3 38,505	61 2,135	1 5,005	9 27,477	1 3,053	3,660	3,660	610	2,440	2,440	175	610	109,
Quitman Street		675	1 14,450	3 38,505	68 2,380	1 5,005	10 30,530	1 3,053	4,050	4,050	675	2,700	2,700	175	675	109,
Robert Treat	I	492	1 14,450	3 38,505	49 1,715	1 5,005	4 12,212	1 3,053	2,952	2,952	492	1,968	1,968	150	492	85,
Roseville Avenue		157	1 14,450	1 12,835	16 560	1 5,005	8 6,106	1 3,053	942	942	157	628	628	100	157	45,
South Street	I	107	1 14,450	1 12,835	11 385	1 5,005	4 12,212	1 3,053	654	654	109	436	436	100	109	50,
South 7th Street		814	1 14,450	4 51,340	81 2,835	1 5,005	11 33,583	1 3,053	4,884	4,884	814	3,256	3,256	200	814	133,
South 11th Street		619	1 14,450	3 38,505	62 2,170	1 5,005	8 24,424	1 3,053	3,714	3,714	619	2,476	2,476	175	619	101,
South 10th Street		269	1 14,450	2 25,670	27 945	1 5,005	6 18,318	1 3,053	1,614	1,614	269	1,076	1,076	175	269	73,
Spruce Avenue		298	1 14,450	3 38,505	30 1,050	1 5,005	6 18,318	1 3,053	1,788	1,788	298	1,192	1,192	125	298	87,
Union Avenue		440	1 14,450	3 38,505	44 1,540	1 5,005	6 18,318	1 3,053	2,640	2,640	440	1,760	1,760	150	440	90,
Vaux Street		197	1 14,450	1 12,835	20 700	1 5,005	2 6,106	1 3,053	1,182	1,182	197	788	788	100	197	46,
Waverly Avenue	I	209	1 14,450	1 12,835	21 735	1 5,005	4 12,212	1 3,053	1,254	1,254	209	836	836	125	209	59,
Wilson Avenue		366	1 14,450	2 25,670	37 1,295	1 5,005	4 12,212	1 3,053	2,196	2,196	366	1,464	1,464	125	366	69,
Not Distributed - B.R.L.																31

EXHIBIT C-1

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

SECONDARY SCHOOLS

SENIOR HIGH SCHOOLS	Participating Students	Project Coordinator 02120005 No.	Project Coordinator 02120005 Amt.	Project/Dev. Development Teachers 02130001 No.	Project/Dev. Development Teachers 02130001 Amt.	Substitutes 1/10 @ $35 02130001 No.	Substitutes 1/10 @ $35 02130001 Amt.	Work(12 mo.) Experience Teachers 02140202 No.	Work(12 mo.) Experience Teachers 02140202 Amt.	Clerk Steno 02130101 No.	Clerk Steno 02130101 Amt.	Textbooks @ $5/P.S. 02200001	Instructional Sup. @ $5/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500309	E.E.E. Activities @ $5/P.S. 02500321	Transportation @ $4/P.S. 05200305	Telephone Base $100 06400401	New Equipment @ $1/P.S. 12400301	Total
Barringer High	586	1	$ 14,450	1	$ 12,835	59	$ 2,065	-		1	$ 5,085	$ 3,516	$ 3,516	$ 586	$ 2,344	$ 2,344	$ 150	$ 586	$ 47,1
Central High	653	1	14,450	1	12,835	65	2,275	1	$ 14,455	1	5,085	3,918	3,918	653	2,612	2,612	175	653	63,(
East Side High	357	1	14,450	1	12,835	36	1,260			1	5,085	2,142	2,142	357	1,428	1,428	125	357	41,(
South Side High	473	1	14,450	1	12,835	47	1,645	1	14,455	1	5,085	2,838	2,838	473	1,892	1,892	150	473	59,(
Weequahic High	410	1	14,450	1	12,835	41	1,435	1	14,455	1	5,085	2,460	2,460	410	1,640	1,640	150	410	57,(
West Side High	405	1	14,450	1	12,835	41	1,435	1	14,455	1	5,085	2,430	2,430	405	1,620	1,620	150	405	57,(
TOTALS SENIOR HIGH SCHOOLS	2,834	6	$ 86,700	6	$ 77,010	289	$ 10,115	4	$ 57,820	6	$ 30,510	$ 17,304	$ 17,304	$ 2,884	$ 11,536	$ 11,536	$ 900	$ 2,824	$ 326,(
JUNIOR HIGH SCHOOLS																			
Broadway Jr. High	159	1	$ 14,450	1	$ 12,835	16	$ 560			1	$ 5,085	$ 954	$ 954	$ 159	$ 636	$ 636	$ 100	$ 159	$ 36,5
Clinton Place Jr. High	441	1	14,450	3	38,505	44	1,540			1	5,085	2,646	2,646	441	1,764	1,764	150	441	69,4
Seventh Avenue Jr. High	278	1	14,450	2	25,670	28	980			1	5,085	1,668	1,668	278	1,112	1,112	125	278	52,4
Webster Jr. High	168	1	14,450	2	25,670	17	595			1	5,085	1,008	1,008	168	672	672	100	168	49,5
TOTALS JR. HIGH SCHOOLS	1,046	4	$ 57,800	8	$ 102,680	105	$ 3,675			4	$ 20,340	$ 6,276	$ 6,276	$ 1,046	$ 4,184	$ 4,184	$ 475	$ 1,046	$ 207,5(
TOTALS SECONDARY SCHOOLS	3,930	10	$144,500	14	$ 179,690	394	$ 13,790	4	$ 57,820	10	$ 50,850	$ 23,580	$ 23,580	$ 3,930	$ 15,720	$ 15,720	$ 1,375	$ 3,930	$ 534,18

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EXHIBIT C-2

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

Budget Distribution 1970-1971

SPECIAL SCHOOLS	B.R.L. Programmed Reading 02200009	Participating Students	Project Coordinator 02120006		Project/Rem. Development Teachers 02130001		Substitutes 1/10 @335 02130001		Work(12 mo.) Experience Teachers 02140202		Clerk Steno 02150101		Teacher Aides 1 La. Kdg. ½ La. 1st Gr. 02160007		Textbooks 0236/P.S. 02200001	Instructional Sup. 0236/P.S. 02400007	Misc. Expenses 0251/P.S. 02500309	E.E.E. Activities 0254/P.S. 02500321	Transportation 0254/P.S. .05200105	Telephone Base 3:00 0261/P.S. 06100101	New Equipment 0251/P.S. 12100101	
			No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.	No.	Amt.								
Alyea Street		23	½	$ 7,225	½	$ 6,418	2	$ 70			½	$2,542	2	$ 6,106	$ 138	$ 138	$ 23	$ 92	$ 92	$ 100	$ 23	$
Arlington Avenue		44	½	7,225	½	6,417	4	140			½	2,543	2	6,106	264	264	44	176	176	100	44	
Boylan Street		392	½	7,225	½	6,418	95	315			½	2,542	2	6,106	552	552	92	368	368	100	92	i
Branch Brook		269	½	7,225	½	6,417	72	245			½	2,543	2	6,106	414	414	69	276	276	100	69	
Bruce Street Deaf		49	½	7,225	½	6,418	5	175			½	2,542	2	6,106	294	294	49	196	196	100	49	
Elliott Street Blind		21	-		-		2	70			1	5,085	1	3,053	126	126	21	84	84	100	21	
Girls' Trade	X	91	½	7,225	½	6,417	9	315			½	2,542	2	6,106	546	546	91	364	364	100	91	
Montgomery Street		313	1	14,450	1	12,835	31	1,085	1	14,455	1	5,085	3	9,159	1,878	1,878	313	1,252	1,252	125	313	
South Eleventh Street		98	½	7,225	½	6,418	10	350			½	2,543	3½	9,159	588	588	98	392	392	100	98	
South Market Street		46	½	7,225	½	6,417	5	175			½	2,543	2	6,106	276	276	46	184	184	100	46	
Wickliffe Street		32	½	7,225	½	6,417	3	105			½	2,543	1	3,053	192	192	32	128	128	100	32	
Woodland Avenue		32	½	7,225	½	6,417	3	105			½	2,543	1	3,053	192	192	32	128	128	100	32	
TOTALS SPECIAL SCHOOLS	$3,888	910	6	$86,700	6	$ 77,009	90	$3,150	1	$14,455	7	$35,556	23	$70,219	$ 5,460	$ 5,460	$ 910	$ 3,640	$ 3,640	$ 1,225	$ 910	$

EXHIBIT C-3

August 25, 1970

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

Public Schools	Participating Students	Project Coordinator 02120006 No.	Project Coordinator 02120006 Amt.	Project/Ten. Development Teachers 02130101 No.	Project/Ten. Development Teachers 02130101 Amt.	Substitutes 1/10 @ $35 02130001 No.	Substitutes 1/10 @ $35 02130001 Amt.	Clerk Steno 02150101 No.	Clerk Steno 02150101 Amt.	Teacher Aides 1 Ea. Kdg. ½ Ea. 1st Gr. 02160007 No.	Teacher Aides 1 Ea. Kdg. ½ Ea. 1st Gr. 02160007 Amt.	Community Aides 02160009 No.	Community Aides 02160009 Amt.	Textbooks @ $6/P.S. 02200101	Instructional Sup. @ $6/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500109	E.E.E. Activities @ $4/P.S. 02500121	Transportation @ $4/P.S. 05200121	Telephone Base $100 06100401	New Equipment @$1/P.S. 12600101	Totals
...en of Angels	100	½	$ 4,575	½	$ 4,200	10	$ 350	½	$ 2,542	1	$ 3,053	1	$ 3,053	$ 600	$ 600	$ 100	$ 400	$ 400	$ 100	$ 100	$ 20,073
...Alysius	133	½	4,575	½	4,200	13	455	½	2,542	1	3,053	1	3,053	798	798	133	532	532	100	133	20,505
...Ann	133	½	4,575	½	4,200	13	455	½	2,542	1	3,053	1	3,053	798	798	133	532	532	100	133	20,994
...Antonious	118	½	4,575	½	4,200	12	420	½	2,542	1	3,053	1	3,053	708	708	118	472	472	100	118	20,540
...Augustine	66	½	4,575	½	4,200	7	245	½	2,542	1	3,053	1	3,053	396	396	66	264	264	100	66	19,220
Charles Borromeo	124	½	4,575	½	4,200	12	420	½	2,542	2	6,106	1	3,053	744	744	124	496	496	100	124	21,725
Columba	139	½	4,575	½	4,200	14	490	½	2,542	2	6,106	1	3,053	834	834	139	556	556	100	139	24,124
Lucy	89	½	4,575	½	4,200	9	315	½	2,542	1	3,053	1	3,053	534	534	89	356	356	100	89	19,797
Mary	110	½	4,575	½	4,200	11	385	½	2,542	1	3,053	1	3,053	660	660	110	440	440	100	110	20,328
Michael	256	1	9,150	1	8,400	26	910	½	2,542	3	9,159	1	3,053	1,536	1,536	256	1,024	1,024	125	256	33,972
Patrick	93	½	4,575	½	4,200	9	315	½	2,542	1	3,053	1	3,053	558	558	93	372	372	100	93	19,884
...Teresa	109	½	4,575	½	4,200	11	385	½	2,542	2	6,106	1	3,053	654	654	109	436	436	100	109	23,360
...diem School	-	-		-		-		½	2,542	-		-		-	-	-	-	-	-	-	2,542
...ALS NON PUBLIC SCHOOLS	1,670	6½	$ 59,475	6½	$ 54,600	147	5,145	6½	$33,052	17	$ 51,901	12	$ 35,636	$ 8,820	$ 8,820	$ 1,670	$ 5,880	$ 5,[illegible]	$ 1,225	$ 1,670	$ 274,374

EXHIBIT C-4

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

SCHOOLS FOR BILINGUAL PROGRAMS	Participating Students	Project Coordinator 02120005 No.	Project Coordinator 02120005 Amt.	Clerk Steno 02150101 No.	Clerk Steno 02150101 Amt.	Textbooks @ $6/P.S. 02200021	Instructional Sup. @ $6/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500309	E.E.E. Activities @ $4/P.S. 02500121	Transportation @ $1/P.S. 05200305	Telephone Base $100 06400401	New Equipment @ $1/P.S. 12400301	Totals
Quitman Elementary - Bilingual	119	1/2	$ 7,225	1/2	$ 2,543	$ 714	$ 714	$ 119	$ 476	$ 476	$ 100	$ 119	$ 12,436
Broadway Jr. High - Bilingual	61	1/2	7,225	1/2	2,543	366	366	61	244	244	100	61	11,210
Burnet Street - Bilingual	186	1	14,450	1/2	2,543	1,116	1,116	186	744	744	100	186	21,185
Franklin - Bilingual	149	1	14,450	1/2	2,543	894	894	149	596	595	100	149	20,171
McKinley - Bilingual	346	1	14,450	1/2	2,543	2,076	2,076	346	1,384	1,384	125	346	24,730
Oliver Street - Bilingual	127	1	14,450	1/2	2,543	762	762	127	508	508	100	127	19,087
South Street - Bilingual	61	1	14,450	1/2	2,543	366	366	61	244	244	100	61	18,435
Sumner Avenue - Bilingual	217	1	14,450	1/2	2,543	1,302	1,302	217	868	868	125	217	21,692
Webster Jr. High - Bilingual	87	1/2	14,450	1/2	2,543	522	522	87	348	348	100	87	19,007
TOTALS SCHOOLS FOR BILINGUAL PROGRAMS	1,353	8	$115,600	1/2	$22,887	$8,118	$ 8,118	$ 1,353	$ 5,412	$ 5,412	$ 950	$ 1,353	$ 169,203

EXHIBIT C-5

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

SCHOOL BUDGET	Participating Students	Project Coordinator 02120005	Project/Dem. Substitutes Development. Teachers 02130001	1/10 @ $35 02130001	Work Exp. Tchrs. (12 mo.) 02160702	Clerk Steno 02150101	Teacher Aides 1 En.Kdgt. ½ En. 1st Gr. 02160007	Community Aides 02160009	Textbooks @ $6/P.S. 02200001	Instructional Sup. @ $5/P.S. 02400007	Misc. Expenses @ $1/P.S. 02500109	E.P.E. Activities @ $4/P.S. 02500321	Transportation @ $4/P.S. 05200105	Telephone Base $100 @ $1/P.S. 06100101	New Equipment @ $1/P.S. 12400101	B.R.I. Programmed Reading 02200009	Totals
ELEMENTARY	15,185	$ 563,550	$1,155,151	$ 53,270	-	$ 198,315	$ 732,720	$ 119,067	$ 91,110	$ 91,110	$ 15,185	$ 60,740	$ 60,740	$ 5,425	$ 15,185	$ 31,112	$3,192,6
SECONDARY	3,930	144,500	179,690	13,790	$ 57,820	50,850	-	-	23,580	23,580	3,930	15,720	15,720	1,375	3,930	-	534,4
SPECIAL	910	85,700	77,009	3,150	14,455	35,596	70,219	-	5,460	5,460	910	3,640	3,640	1,225	910	3,888	312,2
NON PUBLIC	1,470	59,675	54,600	5,145	-	33,052	51,901	36,636	8,820	8,820	1,470	5,880	5,880	1,225	1,470	-	274,3
No. of Personnel		(6½)	(110½)		(5)	(62½)	(280)	(51)									
SUB TOTALS	21,495	$854,225	$1,466,450	$75,355	$72,275	$317,813	$854,840	$155,703	$128,970	$128,970	$21,495	$85,980	$85,980	$9,250	$21,495	$35,000	$4,313,8
Early Childhood Kdg. Title III	-	-	(8) 380,000	$ 4,620	-	-	-	-	-	-	-	-	-	-	-	-	$ 84,6
			$1,546,450	$79,975													
FROM FUNDS OTHER BUDGET																	
Bilingual Program	1,353	(8)$115,600	-	-	-	(1½)$22,887	-	-	$ 8,118	$ 8,118	$ 1,353	$ 5,412	$ 5,412	$ 950	$ 1,353	-	$ 169,2
Experimental Classes at Robert Treat School		-	-	-	-	-	(8) $24,474	-	-	$ 4,000	-	$ 1,800	$ 1,200	-	-	-	$ 31,4

EXHIBIT C-6

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT OF SCHOOLS
SPECIAL ASSISTANCE PROGRAMS
NEWARK, NEW JERSEY

August 25, 1970.

P.L. 89-10 ELEMENTARY and SECONDARY EDUCATION ACT OF 1965
TITLE I PROGRAM FOR EDUCATIONALLY DEPRIVED CHILDREN
(All salaries are averaged for budgetary purposes and do not reflect individual salaries which are paid according to Board Schedules)

BUDGET DISTRIBUTION 1970-1971

SCHOOL SUMMARY	Participating Students	Project Coordinator 02120006	Project/Dem. Development. Teachers 02130001	Substitutes 1/10 @ $35 02130001	Work Exp. Tchrs. (12 no.) 02140202	Clerk Steno 02150101	Teacher Aides ½ Ea. Edgt. & Ea. 1st Gr. 02160007	Community Aides 02160009	Textbooks @ $5/P.S. 02200001	Instructional Sup. @ $5/P.S. 02100007	Misc. Expenses @ $1/P.S. 02500309	E.E.E. Activities @ $4/P.S. 02500321	Transportation @ $4/P.S. 05200305	Telephone Base $100 06100101	New Equipment @ $1/P.S. 12100101	B.R.L. Programmed Reading 02200009	
ELEMENTARY	15,185	$ 563,550	$1,155,151	$ 53,270	-	$ 198,315	$ 732,720	$ 119,067	$ 91,110	$ 91,110	$ 15,185	$ 60,740	$ 60,740	$ 5,425	$ 15,185	$ 31,112	$
SECONDARY	3,930	144,500	179,690	13,790	$ 57,820	50,850	-	-	23,580	23,580	3,930	15,720	15,720	1,375	3,930	-	
SPECIAL	910	86,700	77,009	3,150	14,455	35,596	70,219	-	5,460	5,460	910	3,640	3,640	1,225	910	3,833	
NON PUBLIC	1,470	59,475	54,600	5,145	-	33,052	51,901	36,636	8,820	8,820	1,470	5,880	5,880	1,225	1,470	-	
No. of Personnel		(61½)	(116½)		(5)	(62½)	(200)	(51)									
SUB TOTALS	21,495	$954,225	$1,466,450	$75,355	$72,275	$317,813	$854,840	$155,703	$128,970	$128,970	$21,495	$85,980	$85,980	$9,250	$21,495	$35,000	$
Early Childhood Edg. Title III	-		(8) $80,000	$ 4,620	-	-	-	-	-	-	-	-	-	-	-	-	$
			$1,546,450	$79,975													
FROM C/FWY OVER BUDGET																	
Bilingual Program	1,353	(8) $115,600	-	-	-	(4½) $22,807	-	-	$ 8,118	$ 8,118	$ 1,353	$ 5,412	$ 5,412	$ 950	$ 1,353	-	$
Experimental Classes at Robert Treat School		-	-	-	-	-	(8) $24,474	-	-	$ 4,000	-	$ 1,800	$ 1,200	-	-	-	
GRAND TOTALS	22,848	$[illegible]	[illegible]														

SELECTION OF ATTENDANCE AREAS FOR TITLE I PROJECTS

The attendance areas selected for Title I projects are those areas which, on the basis of the best available information have high concentrations of children from low-income families.

Eligible schools have been listed in order of highest concentration. The criterion used in qualifying schools was based on statistics on Aid for Dependent Children supplied by the Essex County Welfare Board.

Before selecting this method for qualifying attendance areas and schools within those attendance areas the following data were also examined:

- Housing statistics supplied by Applied Urbanetics
- Model Cities Statistics (Entire City of Newark is now a Model Neighborhood)
- Free lunch and free breakfast statistics (32,865 served daily)
- High percentage of Puerto Rican children
- High incidence of foreign born and non-English speaking children
- Health Statistics
- Unemployment and Underemployed statistics

It should be noted that in comparing the statistics and projections compiled by Applied Urbanetics and the A.D.C. statistics provided by the Essex County Welfare Board, that each complements (possibly validates) the other.

	Applied Urbanetics	ADC Statistics
Children from low-income families 5-17	33,011	32,352
District Wide Percentage	32.6%	33.9%

EXHIBIT E

AVERAGE DAILY PARTICIPATION	Oil Type "A"	Type	Daily Average
	47[illegible]	764	338
	10458	2.87	5.48
	16481	1093	5.25
	11003	1745	3.61
	17451	2105	1.34
	12531	974	1.31
	10277	1724	6.46
	5234	1256	4.64
JUNIOR HIGH SCHOOLS	86,300	11,363	8,315
	27[illegible]3	20426	14.55
	24[illegible]8	11634	10.32
	25147	20152	13.47
	6567	5127	3.28
	11525	13024	8.76
	98777	71,419	4.991
	68749	5317	3.47
	5632	1851	2.34
	4349	2412	4.65
	8536	1041	6.21
	13623	9813	6.03
	14721	12744	7.46
	10831	8701	5.42
	20177	17616	15.21
	6563	2465	3.23
	15169	13654	7.32
	7931	5911	3.42
	14732	10411	7.48
	13244	8654	6.45
	11623	11012	2.91
	12662	9614	6.03
	10113	7314	5.66
	13773	9465	6.67
	10153	10241	7.24
	6641	5612	3.23
	9901	3407	4.75
	18373	12701	5.[illegible]5
	3769	2901	1.23
	14287	11955	6.64
	19725	12703	9.46
	11534	11355	5.71
	7224	6564	3.72
	10423	9871	5.11
	9265	6031	4.13
	13320	8717	6.76
	2656	1526	1.34
	21774	14673	11.06
	5312	1931	2.74
	14771	13010	6.64
	23356	14370	11.41
	20423	15465	12.3
	4734	4035	2.38
	4661	4175	3.13
	11[illegible]3	10365	6.46
	6188	4690	3.09
	4744	3033	4.37
	447048	326011	222352
	1720	1410	86
	1663	1166	38
	3120	1150	106
	1644	1398	84
	3381	2897	135
	3917	3111	176
	4326	3164	213
	[illegible]3	[illegible]34	35
	24951	15716	1249
	657306	427507	32563

NEW JERSEY STATE DEPARTMENT OF EDUCATION

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REPORT ON REVIEW OF THE ADMINISTRATION OF TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 COMMONWEALTH OF PENNSYLVANIA

FOR THE PERIOD JULY 1, 1967 THROUGH JUNE 30, 1973

Philadelphia Regional Office
April 1975

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ABBREVIATIONS

LEA	Local Education Agency
OE	Office of Education
SEA	State Education Agency

REPORT ON REVIEW OF THE ADMINISTRATION OF TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 COMMONWEALTH OF PENNSYLVANIA

FOR THE PERIOD JULY 1, 1967 THROUGH JUNE 30, 1973

INTRODUCTION

The HEW Audit Agency has reviewed the management activities of the Pennsylvania Department of Education (State Educational Agency) relating to administering programs under grants received under Title I of the Elementary and Secondary Education Act of 1965, Public Law 89-10. The Act authorized Federal support to local educational agencies (LEAs) for special educational projects for educationally deprived children in areas having a high concentration of low-income families. Public Laws 89-313 and 89-750 extended the scope of the program to include support for handicapped and institutionalized children.

BACKGROUND

Title I authorized Federal grants to LEAs for special educational projects for educationally deprived children in attendance areas where low-income families are concentrated. The primary aim of the program is to help broaden and strengthen education for educationally deprived children.

The U.S. Commissioner of Education is responsible for the overall conduct of the Title I program at the national level and for determining the maximum amount of grants to be allocated to eligible districts or counties as well as State Educational Agencies (SEA) that operate or support schools for handicapped children. The SEA, in its formal application to the Commissioner for participation in the Title I program, includes assurances that it will

administer the program and submit reports in accordance with the provisions of the law and the regulations.

LEAs are responsible for developing and implementing projects to fulfill the intent of the Title I program. This responsibility entails (1) identifying educationally deprived children in areas where there are high concentrations of low-income families, (2) determining the special needs of the children, (3) designing projects to carry out the purposes of the legislation with regard to such children, and (4) submitting applications to the SEA for grants to carry out proposed projects.

Federal funds allocated to Pennsylvania under Title I in fiscal years 1968 through 1973 amounted to about $365,619,000.

SCOPE OF REVIEW

We examined SEA policies and procedures in effect for administration of the Title I program. Our review was directed toward an examination of the methods used for planning, approving and implementing Title I projects, and for controlling grant funds in conformance with the Act, Federal regulations, and Office of Education (OE) guidelines. We also examined pertinent records, held discussions with State and local agency officials, and visited selected school districts through out the State.

In addition, we compared actual operating practices and policies with the procedures and policies incorporated in the application for funds submitted by the SEA, Federal regulations, and other generally accepted management criteria. Our examinations were performed at the SEA and in the Philadelphia, Pittsburgh, Harrisburg, Chester, Scranton, McKeesport, Albert Gallatin, Connellsville, Allentown, Reading and Erie LEAs.

HIGHLIGHTS OF AUDIT RESULTS

The Title I program implemented by the SEA in fiscal years 1968 through 1973 at a cost of over $365 million had a measurable impact on the education of children

from low-income families within the State. Additional analysis and in-depth reviews, by the SEA, emphasizing project implementation and target school selection are needed, however, to assure that project proposals submitted by LEAs fully meet the requirements of the Act and are in accord with the law and the Federal regulations. In our review of projects proposed and implemented by 11 LEAs, we identified activities involving the expenditure of about $10.9 million of Title I funds that, in our opinion, did not fully meet basic requirements.

1. The effectiveness of the program to meet the most pressing special educational needs of educationally deprived children was limited in some LEAs because of the design by LEAs, and approval by the SEA of activities costing about $9.2 million that provided general aid to target area schools or provided services which were not identified with the special needs of educationally deprived children. These activities, while for worthy purposes, did not meet the intent of Title I legislation to concentrate supplemental compensatory education benefits on educationally deprived children.

2. Further, Title I funds totaling more than $1.7 million were spent in fiscal years 1968 through 1973 at non-target schools. The attendance areas served by these schools did not meet OE guidelines for eligibility for Title I funds because the concentration of children from low-income families in the attendance areas was less than the concentration of such children for the district as a whole. The expenditure of Title I funds at these schools continued because the SEA did not perform an adequate analysis of information included in the LEA project application prior to approval.

To prevent the use of Title I funds for other than the intended purposes and to accomplish the primary objective of correcting the educational deficiencies of economi-

cally deprived children, the need for tighter control over LEA operations is indicated. More in-depth review and analysis of submitted proposals together with closer surveillance of LEA day-to-day operations, in our opinion, will assure that program objectives are met and that operations fully meet regulatory requirements.

Also, the SEA needs to emphasize the periodic, objective measurement of the effectiveness of Title I projects in meeting the special educational needs of educationally deprived children. Adequate data were not always developed or used to: (1) assess project effectiveness, (2) revise projects not proving successful in meeting established needs, and (3) identify activities accomplishing the desired goals.

By letter dated June 28, 1974, the SEA submitted a written response to a draft of this report. The text of the reply is included in this report as Appendix I. We have summarized the position of the State Agency on the major points included in the report. The summaries, and our views thereon, are presented at the end of each section of the report.

Although the SEA disagreed with most of our conclusions and recommendations, our review and analysis of the information submitted with the SEA's reply did not disclose any additional data of sufficient significance to warrant a change in our original conclusions or recommended refunds.

Therefore, this report includes specific recommendations that, if implemented, should substantially improve the overall operation of the Title I program. This report also includes recommendations for refund to the Federal Government of certain Title I expenditures that, in our opinion, were not made in accordance with Federal requirements.

IMPROVEMENTS NEEDED IN SEA's ADMINISTRATION OF PROGRAM

Review and approval of project proposals is one of the SEA's most important responsibilities. The SEA is responsible for assuring that project proposals submitted by LEAs meet the requirements of the Act and are, in other respects, in accord with the law and Federal regulations. If the SEA cannot assure that a project meets these requirements, the proposal should be revised and resubmitted or disapproved. OE guidelines provide that Federal funds should not be advanced to an LEA until the project proposal has been received by the SEA in substantially approvable form.

The SEA, to meet its responsibility for the review and approval of project proposals, delegated the responsibility for administering grants under the Title I program to the Bureau of Planning and Evaluation. Within the Bureau, the Division of Compensatory Programs was responsible for the review of project applications. Project applications were submitted to business specialists in the Division for review of the budgetary aspects of the application. After budgetary reviews were completed, the applications were forwarded to one of the seven curriculum specialists who had responsibility for final review and approval of all Title I project applications. A checklist developed by the SEA was used to assure that the major aspects of the project application were reviewed prior to approval.

A review of project applications approved by the SEA showed, however, that reviews performed were not of sufficient depth to assure that program funds were expended in accordance with Title I regulations and guidelines. We noted instances where on the basis of the information included in applications submitted by LEAs, there were major questions as to whether the activities proposed were adequately designed to meet the special educational needs of educationally deprived children. Further, although in some instances SEA reviewers had

raised questions concerning the activities, the proposals were approved as proposed and the LEAs instructed to discontinue the activity the following year rather than disapproving the proposal and requiring immediate revision. Moreover, in many instances where LEAs were advised to discontinue the activity the following year, the LEAs continued to propose, and the SEA to approve, the continuation of the activity.

The following schedule identifies by LEA the amount of Title I funds that was spent on activities at schools that did not qualify to receive Title I funds or to support entire school systems rather than meet the specific identifiable needs of educationally deprived children.

PROGRAMS IMPLEMENTED PROVIDED GENERAL AID

Title I regulations state that each project must be tailored to contribute particularly toward meeting one or more of the special educational needs of educationally deprived children and should not be designed merely to meet the needs of schools or the student body at large in a school or in a specified grade in a school. The regulations state (1) that each project should be designed to meet the special educational needs of those educationally deprived children who have the greatest need for assistance and (2) Title I funds will not be used to provide to children in project area schools the same instructional or auxiliary services that are provided with State and local funds to children in non-project area schools.

We identified 14 projects involving the expenditure of over $9.2 million in Title I funds at 5 LEAs that in our opinion were not in accordance with Title I regulations. These projects as approved and implemented were providing general aid to the LEAs and were not meeting the specific needs of educationally deprived children, since the projects were designed to meet the needs of the student body at large in a school or in a specified grade in a school. In most cases, the LEA Title I application indi-

cated that the projects were providing general aid. However, the SEA approved the projects without requiring further documentation from the LEA to substantiate that the projects would meet a specific educational need of educationally deprived children. The SEA did not, for example, require LEAs to determine and submit with their project proposals, as required by program regulations, the specific educational needs of the children in order of priority. Also, in some instances, even though reviewers raised questions concerning the project, positive action was not taken to disapprove or return the proposal to the LEAs for revision. The projects which in our opinion were providing general aid are described in Exhibit A.

State Agency Comments

In a letter dated June 28, 1974, the SEA did not agree that the conditions reported in this section of the report supported the conclusions that Title I funds were used to provide general aid. The SEA also submitted letters from the individual LEAs which also did not agree with our conclusions. The SEA comments and our views thereon, are presented below. The SEA comments are included in Appendix I.

In the SEA's opinion, the "errors of the auditors" can be characterized as follows:

a) Failure to differentiate screening from actual program participation.

b) Failure to note differences in program content and intensiveness between Title I programs and other LEA programs.

c) Insistence that serving all children in a district or school is "general aid" despite the fact that all or nearly all were economically and educationally disadvantaged. This has special significance in attacking cultural

deprivation (Section 116.1(i) of Federal Regulations).

d) Failure to consistently indicate that in cases of alleged general aid of a "cultural education" nature, that districts were spending most of their Title I money on reading, math, etc. for eligible students. The draft report makes little or no mention of this, leaving the reader with the impression that art, music, physical education and libraries are the only items being funded by Title I.

In our opinion, screening is an essential part of any Title I program if the needs of educationally deprived children are to be identified and projects are to be designed to meet these needs. However, the projects identified by us in Exhibit A, as being general aid, were serving all children. No screening was done to determine those children who needed a particular service to reduce or eliminate their educational deprivation. If screening had been performed and services limited to those children most in need, many of the projects would have met the Title I guidelines.

During our review we interviewed project directors, Title I and locally funded teachers, Title I and locally funded aides and school principals. We also reviewed job descriptions for Title I and locally funded positions. We did not find any instances where the projects listed in Exhibit A were any different or more intense than similar LEA programs. We have provided more detail in our comments to the individual LEA responses in Exhibit A.

We agree that in some instances all or nearly all the children in a given school could be economically and educationally disadvantaged. However, Title I Regulations state:

> . . . but the project area must be sufficiently restricted in size in relation to the nature of the project as to avoid jeopardizing its effectiveness in meeting the aims and objectives of the project.
>
> . . . Each such project must be tailored to contribute particularly toward meeting one or more of the special educational needs of educationally deprived children and should not be designed merely to meet the needs of schools or of the student body at large in a school or in a specified grade in a school.

Furthermore, OE guidelines state that: "The Title I program, if it is to have sufficient size, scope, and quality to give reasonable promise of substantial progress as required by the Act, must be concentrated on a limited number of children." In our opinion, the projects described in Exhibit A were not in accordance with the above regulations and guidelines and therefore should not have been funded by Title I.

We agree that districts were spending most of their Title I funds on reading, math, etc. Title I has had a measurable impact on the children from low-income families within the State. Also, we have indicated in most cases the total Title I funds expended by each LEA compared to the amount expended on general aid type projects.

The SEA reply also stated that:

> The audit report indicates that "In most cases, the LEA Title I application indicated that the projects were providing general aid." The SEA states without equivocation that in no instance was a project knowingly approved which indicated that general aid was being provided.
>
> The SEA disagreed with our statement that in some instances, even though reviewers raised questions

concerning the project, positive action was not taken to disapprove or return the proposal to the LEAs for revision. The SEA replied that the statement is an unwarranted generalization not supported by specific information and further contends that there is no such supporting information.

It was our opinion that the SEA should have taken timely action to assure that projects were not providing general aid. For example, in October 1971 an SEA official wrote to an LEA questioning whether proposed programs supplanted the regular program or provided general aid. The LEA did not respond and the projects were approved in 1972 and 1973 without any further follow-up by the SEA.

In another case an SEA evaluation criticized a Title I program because it could not be distinguished from the regular LEA program. However, the LEA continued to propose the same projects and the SEA approved them without any additional follow-up.

In our opinion if the SEA had made additional follow-up in the cases noted, these projects would not have been approved Title I projects since we found that they were providing general aid to the LEAs.

The SEA disagreed with our statement that LEAs were not required to submit needs of children, since the SEA had issued guidelines which stated that the needs of children should be included in the LEA Title I application.

We agree that the SEA issued instructions concerning the needs of children. However, most of the applications reviewed by us did not contain a list of needs of children in a priority order. These applications were approved as submitted and the LEAs concerned were not required to submit a list of needs.

Conclusions and Recommendations

Owing partly to special interest group pressure and partly to a human desire to do something for as many children as possible, many LEAs tend to spread their limited funds over very large groups and develop general aid projects long desired but not a priority within limited State and local budgets. Consequently, while spent for entirely worthy purposes, funds are dissipated on laudable but inconclusive efforts. If the Title I program is to have a genuine impact of the special educational needs of educationally deprived children, the SEA must require concentration of supplemental compensatory benefits on the most pressing needs of limited and specific groups of children.

Since significant effort is required to assure that programs are effective and in accordance with regulatory requirements, the SEA must develop management techniques and procedures to provide the necessary assurances for compliance with such requirements. Because of the nature or type of activity proposed, isolating those projects that need additional review and further analysis would be a valuable aid in evaluating LEA operations.

We therefore recommend that:

(1) The SEA develop and implement procedures for more in-depth review and analysis of project proposals. These procedures would, as a minimum, provide for additional emphasis on those projects that appear to be designed to meet the needs of a school or the student body at large or entire classes in a school.

(2) The SEA require LEAs to immediately revise projects that reviewers identify as containing activities not in accordance with program criteria, and establish appropriate follow-up procedures to assure that necessary revisions are made in a timely manner.

(3) The SEA discontinue the approval of LEA proposals that provide for the use of Title I funds for teacher aides, library aides, and other aides, unless it is demonstrated that duties to be performed are appropriately related to the special educational needs of educationally deprived children.

(4) The SEA require the LEAs to discontinue or revise those projects identified in this report as not being in accordance with basic program requirements as follows:

a) The library assistants, art specialist teachers, teacher aides, kindergarten aides, and counselor aides in the Philadelphia LEA.

b) The outdoor education program conducted by the Harrisburg LEA.

c) The learning resources cooperative program conducted by the Scranton LEA.

d) The art, music, physical education and library programs conducted by the Albert Gallatin Area LEA.

e) The curriculum coordinators, library services and clerical personnel programs in the McKeesport LEA.

(5) OE require the SEA to return to the Federal Government Title I funds identified in this report as improperly spent as follows:

a) $2,556,788 for library assistants expended by the Philadelphia LEA.

b) $353,990 for counselor aides expended by the Philadelphia LEA.

c) $310,770 for art, music, physical education and library programs expended by the Albert Gallatin Area LEA.

d) $341,711 expended by the McKeesport LEA for curriculum coordinators, librarians and library aides and clerical personnel.

NEED FOR IMPROVEMENT IN METHODS USED TO EVALUATE SELECTION OF TARGET SCHOOLS

In fiscal years 1968 through 1971 the SEA approved Title I expenditures of more than $1.7 million by 4 LEAs for use at non-target schools. The SEA continued to approve expenditures at non-target schools during fiscal year 1972 and 1973 even though we brought this matter to their attention in an audit report issued April 14, 1969. OE also brought this matter to the SEA's attention during a review of the SEA's Title I program in January 1971. The expenditure of Title I funds at non-target schools continued because the SEA did not analyze information included in the project application prior to approval nor did the SEA monitor the expenditure of Title I funds to ensure that they were spent to benefit Title I schools and children.

Program Requirements

In keeping with the concept that a correlation exists between the educationally deprived and the economically disadvantaged, Title I regulations state that a school attendance area will be eligible to participate in the program if it has a concentration of children from low-income families equal to or greater than the average concentration of such children for the LEA as a whole. A school attendance area is eligible to participate either if the percentage of children from low-income families in the area is equal to the percentage for the entire LEA or if the number of children from low-income families in the area is equal to the numerical average of such children in the LEA.

Each LEA is responsible to obtain data to identify low-income families in school attendance areas within an

LEA's jurisdiction. The source data considered acceptable by OE are records on payments of aid to families with dependent children under Title IV of the Social Security Act and other welfare data, health statistics, and data from school surveys containing information on or related to family income. Also, the source data used for determining the number of children from low-income families in an LEA is required to be shown in the application, and made a part of each LEA's official Title I records.

SEA implementing procedures required LEAs to list on the project application all schools where Title I activities were to be conducted, the total number of children enrolled in each school, and the number and percentage of children from low-income families residing in each attendance area. LEAs were also required to rank each attendance area according to the concentration of children from low-income families. The SEA also established an eight percent variance factor for determining if entire school districts could be designated as an eligible attendance area. If concentrations of children from low-income families among the attendance areas varied more than eight percent the entire district could not be designated eligible.

Proposals Included Many Ineligible Schools

Project proposals submitted by 24 LEAs for fiscal years 1968 through 1971 showed that 15 of the LEAs proposed and received SEA approval to designate as eligible and conduct Title I activities in 409 schools that did not meet established selection criteria. SEA approval was given even though information included in the project application showed the schools selected had concentrations of children from low-income families below the district wide average. The following tabulation summarizes the results of our review of the proposals.

Fiscal Year	LEAs Listing Ineligible Schools	Total Number of Schools Listed	Number of Ineligible Schools	Total Title I Funds Received By the LEAs
1968	7	340	50	$16.6
1969	11	400	97	17.6
1970	14	432	169	23.5
1971	14	422	93	26.7
TOTAL	46	1,594	409*	$84.4 million

* This figure does not represent 409 different schools, since some of the same schools are repeated each year.

There was sufficient information included in the project applications to detect that the LEAs had designated ineligible schools as target schools. However, in none of the above instances did the SEA disapprove the selections or otherwise question the LEA relative to the basis used to include schools. The following examples illustrate the type of information in the proposal which should have alerted the SEA of the need to require revision in the project as submitted.

(1) The McKeesport LEA proposed to implement the Title I program in 22 elementary and secondary schools during fiscal year 1969. According to the project application, 14 of the schools served attendance areas with percentages of children from low-income families below the district-wide average of 11.7 percent. One of the schools served an attendance area where only 2 of the 235 children or less than 1 percent were from low-income families. Again in fiscal year 1970, the LEA designated 22 schools as eligible to participate in the Title I program. Thirteen of the designated schools served attendance areas which had lower percentages of children from low-income families than the district-wide average of 14.6 percent. In one attendance area where 105 children resided, only 3 or 2.85 percent of the children were from low-income families. In fiscal year 1971 the LEA designated 19 schools as eligible to partici-

pate in the Title I program, when in fact, ten of the schools served attendance areas which had lower percentages of eligible children than the district-wide average of 14.8 percent of children from low-income families.

(2) The district-wide percentage of children from low-income families was 14.5 percent at the Wyoming Valley West LEA in 1970. The LEA proposed to implement the Title I program in 27 schools during 1970. Ten of the designated schools served attendance areas with percentages of children from low-income families below the district-wide average. One of the schools served an attendance area where only 5 of the 276 children or 1.8 percent were from low-income families. Again in 1971, 27 schools were designated as eligible for Title I programs. Twelve of the schools served attendance areas which had percentages of children below the district-wide average of 17 percent. One of the attendance areas had 241 resident school age children of which only 3 children or 1.2 percent were from low-income families.

(3) The Hazelton LEA designated the entire school district as one target area in the 1971 project application and proposed to implement Title I programs in 29 elementary and secondary schools. Information contained on the application showed that the percentage of children from low-income families residing in the attendance areas served by the 29 schools ranged from 5.5 to 31.6 percent. Since Federal regulations require that, in order for an LEA to designate all schools as part of the target area, there should be no wide variance in the percentage of children from low-income families in each attendance area, the Hazelton LEA could not qualify as one target area. Using the district-wide average of 13 percent as shown on the application,

16 of the 29 schools listed were not eligible to participate in Title I activities because the areas had concentrations of children from low-income families below the district-wide average.

Expenditures at Non-Target Schools

We were unable to determine from available records at the SEA, the amount of Title I funds expended at ineligible schools by the 15 LEAs. We therefore visited three of the 15 LEAs to determine the amount of Title I funds spent at the ineligible schools. We were also unable to readily determine at the LEAs the total amount of funds expended at ineligible schools because expenditure records did not show cost for each school. However, we did identify expenditures totaling $1,477,297 by the Pittsburgh LEA, and $163,000 by the Philadelphia LEA. Further, on the basis of our examination at these LEAs, it was apparent that in addition to those expenditures which we identified, substantial amounts of Title I funds were spent at the ineligible schools. The detail results of our examination at each of the LEAs are presented below.

PITTSBURGH

During fiscal years 1968 to 1971, the Pittsburgh LEA designated a total of 286 schools as eligible to participate in the Title I program. The number of schools designated ranged from 67 schools in fiscal year 1970 to 76 schools in fiscal year 1968. Our comparison of the concentration of children from low-income families with the district-wide average of such children showed that of the 286 total schools, 124 had concentrations of children from low-income families below the district-wide average and were therefore not eligible Title I schools. A summary of the ineligible schools by year is presented in Exhibit B.

Cost data provided by the LEA showed that over $1.4 million of Title I funds were expended in the ineligible schools during fiscal years 1970 and 1971. Cost data was not available for fiscal years 1968 and 1969. However, on the basis of the amount of Title I funds allocated to the Pittsburgh LEA in fiscal years 1968 and 1969 and the percentage of ineligible schools to total schools, an additional $3.3 million of Title I funds may have been expended in the ineligible schools during fiscal years 1968 and 1969.

During our review at the Pittsburgh LEA we were unable to specifically determine why the above schools were selected as target schools. Personnel responsible for selecting schools for participation during fiscal years 1968 through 1971 were no longer employed by the LEA and current officials were unable to explain why the schools were selected. There were no records or other documentation available which provided any indications as to why schools with concentrations of children below the district-wide average of such children were selected.

PHILADELPHIA

Of the total 707 schools designated by the Philadelphia LEA as eligible to participate in the Title I program, the percentages of children from low-income families in 72 schools were below the district-wide average during fiscal years 1968 to 1971. Even though information included in the project applications for these years showed that these schools did not meet established program eligibility criteria, the LEA's proposal was approved to implement the Title I program in these schools. A summary of the ineligible schools by year is shown in Exhibit C.

Records were not available at the LEA showing the actual amount of Title I funds expended at each of

the ineligible schools. However, we noted that the LEA had budgeted over $1.7 million of Title I funds for the ineligible schools listed on the fiscal year 1971 applications. A limited review of personnel records indicated that as of December 1970, 40 aides and teachers whose annual salaries amounted to about $163,000 were assigned to the Title I Kindergarten, New Staffing Patterns, and Art Specialist Programs at the 14 ineligible schools listed on the 1971 project application. Review of the payroll distribution report on June 11, 1971 showed that Title I funds were used to pay the salaries of 31 teachers and aides at the 14 ineligible schools.

In discussing rationale used in selecting target schools, a responsible LEA official informed us that in prior years selection of target schools was based on information compiled by the Philadelphia Anti-Poverty programs. The Program established "pockets of poverty" throughout the City. In determining these "pockets" data on income, minority groups, social factors, etc., were analyzed. Instead of computing the percentage of children from low-income families for each attendance area in determining schools eligible to participate in the Title I project as required by regulation, the LEA considered the schools located in these "pockets of poverty" as target areas. As shown by our review, however, many of the schools located in these geographical areas had a concentration of children from low-income families below the district-wide average and should not have been designated as target schools.

Also, the LEA had budgeted over $600,000 of Title I funds during fiscal years 1970 and 1971 for 62 schools that had not been designated by the LEA as eligible for participation in the Title I program on the project application approved by the SEA. We were unable to determine the total amount of Title I

funds actually expended in these schools during the two year period. However, a limited review of payroll records by the Comptroller's Office of the City of Philadelphia indicated that the LEA expended at least $152,278 of Title I funds during fiscal year 1971 for salaries of personnel assigned to schools that had not been designated by the LEA on the project application as eligible to participate in the Title I program. At the time of our review no disposition of the $152,278 had been made.

Continuing Weaknesses In SEA Review Procedures

In our prior audit report dated April 14, 1969 on the administration of the Title I program, we reported that the State Agency had approved project applications submitted by LEAs even though information contained in the application showed that Title I programs were being proposed for implementation in schools that did not meet the established eligibility requirements. Weaknesses in State Agency review procedures were cited as the cause and recommendations were made to the State Agency to establish the necessary controls for screening out those applications not meeting the eligibility requirements.

In January 1971, personnel from the U.S. Office of Education conducted a review of the SEA's Title I program. The OE review concluded that, in order to insure that the Pennsylvania Title I program is brought into compliance with requirements as soon as possible, the SEA should, among other things, take steps to approve only those Title I project applications which meet legal requirements, especially in terms of proper identification of attendance areas to assure that Title I services were implemented in the proper schools.

SEA officials, in response to our previous audit report and the OE review, agreed that applications containing ineligible schools had been approved. Action taken by the SEA since these two reviews included developing and issuing a directive to all LEAs regarding the acceptable

method of selecting target schools. The directive was dated August 18, 1971 and required LEAs to identify the method used to select schools included in the fiscal year 1972 project applications. SEA project reviewers were provided copies of the directive and also participated in workshops with LEAs relative to school selection.

In discussing our current review, SEA officials again agreed that projects had been approved that showed schools were selected that had concentrations of children from low-income families below the district-wide average. These officials stated, however, that in their opinion action taken was sufficient to correct the situation and that fiscal year 1972 and 1973 applications would not include ineligible schools or would be detected by SEA reviewers and returned for revision.

Our examination of fiscal year 1972 and 1973 applications, and other related information, indicated that the State Agency's action was not completely effective. We noted, for example, that in 19 of the 22 fiscal year 1972 applications we previously reviewed no questions were raised concerning the eligibility of schools proposed for Title I participation. Based on the information available in the 1972 applications we were of the opinion that at least five of these applications should have been questioned or disapproved. We reviewed 21 fiscal year 1973 applications for LEAs granted $300,000 or more. Based on information available in the applications we noted that 31 ineligible schools out of a total of 71 schools were designated as target schools by three LEAs. In our opinion these schools should have been declared ineligible based on the information available to the SEA. The following examples illustrate the type of information included that indicated the need for additional information prior to the approval of the fiscal year 1972 and 1973 applications.

1. The McKeesport LEA indicated that the entire district qualified as one target area in fiscal year 1972 and 1973. However, the percentages of children

from low-income families residing in the school attendance areas listed on the application ranged from 8.5 to 33.9 percent in fiscal year 1972 and from 2.29 to 27.6 percent in fiscal year 1973. Federal regulations provide that, to qualify an entire school district as a target area, there should be no wide variance in the percentage of children from low-income families in each attendance area. In 1972, the State Agency established criteria which stated that, in order for a school district to designate all schools as part of the target area, the percentage of children from low-income families in each school should not vary by more than 8 percent from the district-wide average. The McKeesport LEA was not eligible to use this method. We found no evidence in the files available for our review to indicate that the State Agency reviewer had checked the eligibility of each attendance area or had questioned the designation of the entire district as a target area prior to approval of the application. In applying the percentage method of determining eligibility of schools to participate in the Title I program, eight of the designated schools in fiscal year 1972 and 16 of the designated schools in fiscal year 1973 served attendance areas where the percentage of children from low-income families was below the district-wide average and were therefore not eligible for participation in the program.

We visited the McKeesport LEA and were informed by LEA officials that the entire district was considered a target area because of the desegregation plan implemented by the LEA. Our review showed that the LEA was providing instructional leaders, principals and a library aide which benefited all children in the non-target schools. A total of $50,815 in Title I funds was expended for principals and the library aide in the ineligible schools during fiscal years 1972 and 1973. (See Exhibit D)

2. The Allentown LEA indicated on its fiscal year 1972 and 1973 applications that 15 schools were ineligible to participate in Title I services. However, the LEA requested approval to provide reading services to 15 children in each of the ineligible schools since these children resided in target areas but were bussed to non-target schools to achieve desegregation. The SEA approved the request but limited the services to only those children who resided in target area.

   We visited the Allentown LEA and reviewed the reading program conducted in the non-target schools. Only 34 of the 236 students bussed to non-target schools participated in the program. These 34 students represented 11.26 percent of the total enrollment in the Title I reading program at non-target schools. Title I funds totaling $51,429 were expended during fiscal year 1973 to provide services to 302 children of which only 34 were eligible to receive such services. (See Exhibit E)

3. The Armstrong LEA, as in prior years, did not identify the number of children from low-income families for each attendance area. Instead, the schools were grouped by geographic area and a percentage of children from low-income families residing in each of the geographic areas was computed. On the basis of these percentages, the LEA considered the entire school district as a single target area. We found no evidence in the files available for our review to indicate that the SEA reviewer had determined that each of the school attendance areas was in fact eligible to participate in the program. We do not believe that the SEA could have made a valid determination that the entire school district qualified as a single target area without ascertaining the number of low-income family children of school age residing in each of the attendance areas.

4. Three LEAs indicated that the entire school district qualified as a single target area in 1972, even though in 1971 the variances in the percentage of children from low-income families residing in the attendance areas served by the schools proposed for participation in the Title I program were significantly greater than the 8 percent maximum established by the SEA for qualifying an entire district as eligible during 1972. The percentage range of children from low-income families residing in the attendance areas listed on the 1971 application for the Bentworth LEA was 10.7 percent to 40.7 percent, and for Albert Gallatin, 28.9 to 53.9 percent. In our opinion, had an adequate review been made, giving consideration to all information available to the SEA, including the prior year's applications, the 1972 applications would not have been approved unless the LEAs were able to provide adequate justification as to how the high variance of children from low-income families among the attendance areas in 1971 was reduced to less than 8 percent in 1972. We found no evidence that the SEA required the LEAs to submit any explanation or justification along this line prior to approval of the 1972 applications.

We discussed the above examples with SEA officials and they agreed that Title I funds were still being approved and expended in ineligible schools. They attributed the approval to inadequacies in the SEA review and monitoring processes.

State Agency Comments

The State Agency commented on the section *Continuing Weaknesses in SEA Review Procedures*:

> "We question statements about desegregation and eligible schools. During the period of time covered by this audit, certain school districts were under

court orders concerning the State Human Relations Commission's decision to desegregate their schools. Consequently, in an effort for the Title I program . . . to have a positive effect on their desegregation program and primarily because of the dispersal of minority group children throughout the district, the Title I office in effect recognized these districts as being able to declare the entire school district as an eligible attendance area."

ESEA Title I Program Guide Number 64 entitled "The Administration of Title I of the Elementary and Secondary Education Act in Districts That Have Undergone Desegregation" states:

> Wherever definite attendance areas or zones have been established, whether through a desegration plan or otherwise, Title I services are to be offered only to children who live in those areas or zones which have at least average or higher than average concentrations of children from low-income families (see Title I Regulations, Section 116.17). Each local educational agency that has undergone desegregation must, therefore, in planning its Title I program for fiscal year 1972 determine which of its attendance areas are eligible for Title I projects. If there are no well defined attendance areas, the local educational agency should redetermine which of its schools are ineligible for Title I projects on the basis that the incidence of children from low-income families in those schools is as high or higher than the average incidence for all schools in the district.
>
> In districts with no wide variations in the concentrations of children from low-income families, a whole school district or a group of contiguous school attendance areas may be regarded as a single area of high concentration. Such determinations should, of course, be limited to those school districts where the variation between the areas of highest and low-

est concentration is significantly less than the average variation for the State. In each such case the local educational agency must make a special effort to ensure that Title I services are concentrated sufficiently on a limited number of children to insure an effective program.

The LEAs cited in this report as having Title I programs in ineligible schools had wide variations in the concentrations of children from low-income families. Therefore, they were not eligible to regard the whole school district as a target area. The SEA policy of allowing LEAs under a desegregation order to declare the entire school district as an eligible attendance area is not in accordance with Program Guide Number 64 and should be discontinued.

LEA Comments

Individual LEA comments were provided through endorsement by the SEA of letters written by the LEAs. The letters were submitted as exhibits to the formal SEA reply. Presented below are the comments of the LEAs along with our comments.

PHILADELPHIA

The LEA agreed that target schools were selected based on "pockets of poverty" along with other data on income. The LEA also stated: "However, it must be *stressed* that the School District of Philadelphia did not have any additional annual, hard data on the concentration of children from low-income families, school by school, available to update the list of Title I eligible schools. As a result, it was impossible to justify to parents, community members, and school staffs the elimination of services from schools which did not have a percentage equal to or greater than the district-wide average.

It must also be emphasized that the School District petitioned the State and County Board of Assistance for information on the addresses of families of children from low-income families that could be used to accurately revise the list of Title I eligible schools. However, this information was not obtained until 1972. Consequently, for the period 1967-71 cited in the report, there was no objective basis on which to exclude schools from the Title I Program and deprive children of services sorely needed."

We agree that additional annual hard data may not have been available. However, OE guidelines state that the attendance areas selected for Title I projects are those areas which on the basis of the best available information have high concentrations of children from low-income families. By regulation, the attendance areas with high concentrations of children from low-income families are those areas where the concentration of such children is as high or higher than the average concentration for the district as a whole.

The LEA used the best available data uniformly throughout the district and should have only designated those schools with a concentration of children from low-income families as high or higher than the district-wide average of such children. We do not believe that schools should be designated as target schools because of the pressure of parents, community members, and school staff. If Title I funds are to benefit the children from low-income families they must be concentrated in the schools having the largest percentages of such children as required by the regulations.

PITTSBURGH

The LEA stated that they did not make a deliberate attempt to operate programs in schools that did not satisfy Title I regulations but there was a lack of documentation to justify the participation of the

schools listed on the applications. In addition, when accurate data became available and accountability could be validated, schools that had been participating in Title I programs during periods of inaccurate statistics were in fact eligible. Further the LEA stated there was a wide discrepancy of statistics between the 1967-68 and 1971-72 school years.

We agree that the statistics for low-income children varied from 1967-68 and 1971-72. In fact, the number of low-income children used by the SEA to allocate Title I funds to the LEA increased from 17,543 in 1967-68 to 32,116 in 1971-72. This increase can account for schools being eligible in 1971-72 that were not eligible in 1967-68.

Our main point was that the SEA was approving Title I applications that listed ineligible schools based on the statistical data available and furnished by the LEA. In the LEA's 1971-72 Title I application, three ineligible schools were listed as eligible Title I schools. In 1971-72 the LEA claims to have had accurate data, however they were still listing ineligible schools on their application as well as conducting Title I programs in those schools. Therefore, we must conclude that Title I programs operated in ineligible schools from 1967-68 to 1971-72.

McKEESPORT

The school year 1969-70 was the first year of our desegregation plan. We were under the impression, and still are, that all schools involved in the integration plan become target schools. We still have no evidence to refute this belief.

Program Guide Number 64 which covers LEAs that have undergone desegregation provides that the LEA should determine which of its schools are eligible for Title I projects on the basis that the incidence of children from low-income families in those schools is as high or higher than the average incidence for all schools in the

district. Therefore, we are still of the opinion that the $50,815 of Title I funds mentioned in this report was spent in ineligible schools.

ALLENTOWN

> The LEA agreed that children in non-target schools were participating in a Title I reading program. The SEA was aware that children from ineligible schools were participating in the program since the program and participants were fully detailed in the Title I application approved by the SEA. Furthermore, the LEA has since revised its reading program conducted in ineligible schools during the 1973-74 school year to include only those children that were bussed in from eligible attendance areas.

We agree that the SEA approved the LEA's Title I program in ineligible schools. However, the LEA did not serve the children as outlined in the approved application. The application showed that 300 children would be served (225 bussed in from target areas and 75 children in the ineligible school). The program as conducted served 302 children (34 bussed from target areas and 268 children from the ineligible school). In fact one school had 34 children bussed in from target areas and not one was enrolled in the Title I reading program at that school. (See Exhibit E)

In our opinion Title I funds should have only been expended on children from target areas. Therefore Title I funds totaling $5,790 ($51,429÷302×34) was the only benefit received by children residing in target areas. Therefore, $45,639 ($51,429-5,790) was expended to serve ineligible children.

Conclusions and Recommendations

If the limited program funds available are to be utilized as intended by law, for assisting the educationally deprived children in areas where low-income families are

concentrated, the determination of those school attendance areas that are to participate in each LEA's program is one of the more important aspects of the Title I program. It is the State Agency's responsibility to review and monitor project applications and assure that only the highest concentrations of educationally deprived children benefit from the Title I program.

We therefore recommend that:

(1) The State Agency place additional emphasis on the review and evaluation of schools selected by LEAs in relation to established criteria.

(2) The State Agency establish procedures to continuously monitor Title I activities implemented by the LEAs to assure that programs are conducted at eligible schools only.

(3) OE consider obtaining an appropriate financial adjustment for Title I funds identified in this report as being expended at ineligible schools in Philadelphia, Pittsburgh, McKeesport and Allentown LEAs as follows:

Philadelphia	$ 163,000
Pittsburgh	1,477,297
McKeesport	50,815
Allentown	45,639
TOTAL	$1,736,751

(4) The SEA determine the disposition of $152,278 identified by the City Comptroller as being spent by the Philadelphia LEA in ineligible schools and make an appropriate refund to the Federal Government.

NEED FOR MORE MANAGEMENT EMPHASIS ON PROJECT EVALUATION

The resources provided through the Title I program, enabled the SEA to authorize projects by LEAs that pro-

vided new or additional services that would not have been available or made available only on a limited basis to educationally deprived children in the State. The SEA did not, however, require LEAs to fully comply with established Title I evaluation criteria. Adequate data were not always developed and used to assess project effectiveness or revise projects not proving successful in meeting identified needs as well as identifying activities accomplishing the desired goals. As a result, the SEA was not in a position to assess the overall impact of the $365 million of Title I funds awarded to the State during fiscal years 1968 to 1973.

Specifically:

(1) the SEA approved project proposals, contrary to established project approval criteria that did not clearly state education objectives or the type and extent of change expected, and

(2) evaluation reports submitted by LEAs were subjective and often expressed in general terms precluding meaningful assessment of program effectiveness.

Approved Projects Did Not Include Clearly Stated Education Objectives

Effective evaluation begins with project planning. Desired results must be determined and established with which actual accomplishments can be compared. Education objectives should be defined in specific units of output and reflect the most pressing needs of the educationally deprived children to be served.

To assure that it can be determined if Title I activities are accomplishing program objectives, OE Program Guide Number 44 governing approval of project proposals submitted by LEAs requires that to be an approvable project, the education objectives must be clearly

and realistically stated in terms of the types of changes sought and the degree of change expected by the end of the year. The SEA is required to determine that proposals include specific evaluation procedures consistent with project objectives. Unless the procedures are described to enable appraisal of potential effectiveness, the project should not be approved.

(3) Project review procedures performed by the SEA did not include a determination, prior to approval, that (1) the proposed activities could be evaluated or (2) the objectives to be met were clearly and realistically stated in terms of types and degrees of change expected. In the most part, activities proposed by LEAs were approved as submitted.

In our detailed examination of project proposals submitted by 42 LEAs for fiscal years 1971 to 1973 and subsequently approved by the SEA, we noted numerous instances where the proposals did not meet OE requirements. The proposals included general overall objectives without reference to types and degrees of change expected or baseline data to show that the extent of the deficiency. Many of the proposals included such overall objectives as "to instruct pupils" or "to improve the reading performance of all students within the district". They did not show how far behind the children were or the expected improvement at the end of the year. [(4) The SEA did not require the LEAs to identify and rank, on a priority basis, the needs of educationally deprived children. Project applications were approved that merely stated that the activity would meet a general need or needs of the children without reference to priorities. In some instances, the project application did not include any data relative to needs of the educationally deprived children.]

Evaluation Reports Did Not Include Objective Measurement Of Accomplishments

The Title I Act requires that effective procedures, including provision for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children. The implementing OE Title I guidelines state that, "The measurements of pupil changes and attainments in Title I projects must be more carefully assessed and controlled than casual teacher judgment." The meaning of these changes will in most cases, involve appropriate measurements before, during, and after the project and the differences observed, when compared with predetermined goals, will provide a basis for measuring project success. OE guidelines also place with the SEA the responsibility for synthesizing the results of the evaluation reports of all the projects and programs under its jurisdiction. The guidelines suggest the early grouping of approved projects and programs according to objectives, designs, and measuring instruments utilized to facilitate the assessment of the overall impact of Title I in the State.

(5) A detailed review of project evaluations performed by the SEA and LEAs showed that evaluations were not always performed annually, as required, and were often expressed in general terms with no objective measurements of project effectiveness or evidence that such measurements were attempted.] In some instances, there was no information in the project application to show how the effectiveness of the activity would be measured. In other instances, the methods for measuring effectiveness were stated in such general terms as: (1) diversified data accumulating techniques (unidentified); (2) student attitudes and performance; (3) instructor judgement; and (4) observation, with no reference to types and degrees of change expected. Further, project cost

data were not available or considered by the SEA prior to approval of the proposed projects or during the evaluation of completed projects. Consequently, meaningful assessments of program effectiveness both in terms of educational achievement and Title I expenditures were often not possible.

On-site evaluation reports

On-site evaluations were usually performed by per diem paid teachers and school administrators who had attended in-service training sessions conducted by the SEA's Division of Program Evaluation. The Division also prepared procedural guidelines for these evaluations. Prior to the on-site evaluations, LEAs were required to submit a self-evaluation report which was made available to the on-site team. The on-site evaluations were designed to show the strengths of the projects, special problems and weaknesses and recommendations. The evaluations emphasized the following areas: (1) general objectives; (2) calendar objectives; (3) in-service; (4) dissemination; (5) evaluation; (6) change impetus; and (7) community involvement.

On-site evaluations were available for 20 of the 42 LEA applications which we selected for review to determine if the methods for measuring project effectiveness had been clearly defined. These on-site evaluations showed that in only two cases did the evaluation team comment that the LEA had established effective procedures and techniques for evaluation of project effectiveness and accomplishments. In six of the 20 evaluations, a weakness or special problem identified was a lack of data to give evidence of success of activities. Recommendations were directed toward development of statistical data to enable evaluation of the projects. Most of the evaluations we reviewed presented generalities rather than specific details which precluded an overall assessment of the programs. Some examples of the types of comments included in the evaluations were:

. . . The emphasis on the social aspects of the program is by far the most outstanding.

. . . The human relations training program is outstanding and has filtered throughout the district in a positive fashion.

. . . It appears that the school district received a lot of dental services for the money spent.

. . . The use of aides is commendable.

. . . The program of remedial reading is well staffed, well organized, well administered, and provides superior service to the pupils it serves.

Self-evaluation reports

Self-evaluations performed by the LEAs prior to on-site evaluations were available at the SEA. Procedures had not been established by the SEA, however, to assure that the LEAs were performing annual self-evaluations of their programs as required by program regulations. Only through the on-site evaluations was the SEA able to determine if self-evaluations were performed. These self-evaluations covered the same areas as the on-site evaluation. The self-evaluations often dealt in generalities rather than specific measures of effectiveness.

In some cases, special self-evaluations were requested by the SEA and submitted by the LEAs. These reports were not standardized with respect to format or data presented and generally covered programs selected by the LEA for evaluation. Special self-evaluations were requested by the SEA from 29 LEAs and covered a total of 48 instructional activities, of which 24 were reading and related projects.

Our review showed that, while the special evaluations of about 50 percent of the activities included pre and post testing results, evaluations for only 30 percent showed that the testing results were analyzed and comparisons made in an attempt to measure the effective-

ness of the activities in improving the educational attainment of educationally deprived children. Further, the evaluations for the remaining 50 percent presented only generalized narratives with no pre and post testing results. Since specific measures of educational achievement were not shown, meaningful assessments of project effectiveness in meeting established program objectives were precluded.

Cost Data Not Available For Consideration in Evaluating Title I Projects

In addition to the lack of objective measures of project effectiveness as described above, the SEA did not require LEAs to maintain or report budget and expenditure data on individual projects. Instead, Title I funds were budgeted and accounted for by type of expense within the LEAs total program. It is our opinion that the estimated costs of proposed projects should be considered in conjunction with the expected results, prior to approval by the SEA, to assure that Title I funds are planned for expenditure in the most effective manner. Further, evaluations or project effectiveness would be enhanced when actual costs of the project are considered in conjunction with project accomplishments. Without project cost data, there is no assurance that the liimted amount of Title I funds available are being used in the most efficient and effective manner in meeting the special educational needs of educationally deprived children.

State Agency Comments

State Agency officials verbally recognized the weaknesses in evaluations of Title I programs and indicated that instruments to be used to evaluate projects need to be designed and applied in order to determine whether project objectives are met. They believe this to be a major problem because: (1) educators cannot agree on the best method for measuring project effectiveness;

(2) measurements of pupil changes and attainment are always being questioned; (3) many LEAs will not accept tests as a means for evaluation of an individual in a Title I project; and (4) local conditions, attitudes and group pressures have a profound effect on evaluation concepts. The Title I coordinator stated that standardization of evaluation data is needed before an atempt is made to perform an overall evaluation of the Title I program. With regard to project cost data, the Title I coordinator agreed that this data was needed, and stated that ten LEAs with the largest budgets were required to submit separate budgets for each project within their Title I program for fiscal year 1973.

In the written response the SEA disagreed with our statement that the SEA did not require the LEAs to identify and rank, on a priority basis, the needs of educationally deprived children since SEA guidelines required that identification and priority of needs be included in the Title I application.

We agree that SEA guidelines require the listing of the priority of identified needs of educationally deprived children. However, many of the applications reviewed did not contain specific identified needs listed in priority. Also there was no indication that SEA reviewers requested this information from the LEAs prior to approving the application. In our opinion this information should be included in the application before SEA approval of a Title I project.

The SEA had no other specific comments in this area.

Conclusions and Recommendations

Our examination showed that the SEA needed to emphasize the periodic, objective measurement of the effectiveness of the Title I program in meeting the special educational needs of educationally deprived children. Adequate data were not always developed or used to assess project effectiveness and discontinue or revise ac-

tivities not proving successful, as well as identifying those activities accomplishing the desired goals.

We therefore recommend that the SEA:

(1) Require LEAs to submit with their project application a sufficiently detailed description of the methods and procedures to be used to evaluate each major activity to enable appraisal of the potential effectiveness of the proposed projects prior to approval.

(2) Require LEAs to show the estimated cost of each project contained in the application and maintain and report Title I expenditures on the same basis.

(3) Require LEAs to perform annual evaluations of the effectiveness of their Title I programs in meeting the special educational needs of educationally deprived children, including appropriate objective measurements of educational achievement.

(4) Review and consider the results of the evaluations in terms of effectiveness and cost prior to approving future project applications.

STATUS OF PRIOR AUDIT FINDINGS

In April 1969, the DHEW Audit Agency issued an audit report on the SEA's administration of the Title I program for the period July 1, 1966 to August 31, 1967. The findings presented in that report included (1) weaknesses in financial reporting; (2) improper administration of letter-of-credit withdrawals and advances to the LEAs; (3) improper charges of $442,394 for costs not actually incurred, not substantiated or meeting the requirements of the Act; (4) inadequate audits of local expenditures; (5) ineligible schools participating in Title I programs; (6) weaknesses in budgetary controls; (7) incomplete evaluations of Title I programs; (8) incomplete or inadequate LEA equipment inventories; (9) lack of internal control in the payment procedures; and (10) lack of internal review.

For the most part, the State Agency took corrective action on the findings in the report. Our current audit, however, showed that the SEA had not sufficiently increased its overall review and analysis of project proposals to adequately assure that project proposals submitted by the LEAs fully met the requirements of the Act and were in accord with the law and Federal regulations. As previously reported, the SEA has continued to approve projects that included schools not eligible for participation in the Title I program. As a result, the number of ineligible schools approved by the SEA had increased substantially and the finding is repeated in this report.

EXHIBIT A

PROJECTS THAT WERE PROVIDING GENERAL AID

PHILADELPHIA LEA

The Philadelphia City LEA is the largest in the State and during fiscal year 1967 through 1971 was allocated about $57.3 million (27 percent) of the total $220 million of Title I funds provided to the State. The Title I program conducted after fiscal year 1971 is the subject of a separate HEW Audit Agency report; therefore our comments in this report are limited to fiscal years 1967 through 1971. During our examination we identified activities involving the expenditure of about $8 million of Title I funds that were not used to meet the specific educational needs of educationally deprived children. We identified Title I expenditures that did not meet program criteria of concentrating supplemental compensatory education benefits on educationally deprived children totaling (1) $2.6 million for library assistants, (2) $1.2 million for art teachers, (3) $2.8 million for teacher aides, (4) $1.4 million for kindergarten aides, and (5) $354,000 for counselor aides.

Library Assistants

Title I funds amounting to $2,556,788 were expended for the salaries of library assistants from fiscal year 1968 to 1971. Library assistants were also funded with Title I funds in fiscal years 1972 and 1973.

In fiscal year 1971, Title I funds were used to provide 120 library assistants and five supervisors to 181 schools in the Philadelphia School District. The duties performed by the library assistants, however, were not specifically related to special educational needs of educationally deprived children. Instead, the duties performed were routine clerical and mechanical tasks associated with the overall operation of the libraries. Library usage was in-

corporated into the regular school curriculum for students in kindergarten to high school, with weekly visits to the school library scheduled for all children.

As designed and implemented, this activity served the general needs of the schools and was not specifically related to identified educational needs of educationally deprived children. Furthermore, the LEA provides 99 library assistants with local funds and all schools in the LEA have library assistant services either through Title I or local funding.

Title I regulations section 116.17(a) and (h) provide that (1) projects should not be designed merely to meet the needs of schools or of the student body at large in a school or in a specified grade in a school and (2) Title I funds will not be used to provide instructional or auxiliary services to project area schools that are ordinarily provided with State and local funds to children in nonproject area schools. Therefore, the use of Title I funds to pay library assistants to perform routine functions necessary to the overall operation of the library is, in our opinion, a general aid type program not eligible as a Title I activity.

LEA Comments

In their written reply to our draft report the LEA stated that recent findings indicate that the library aides participate in a variety of tasks which are related to each school's Title I Reading Programs. They (1) order, organize and make available the books selected for use by individual classroom teachers, (2) provide groups of educationally deprived students with instructions in how to use the library, (3) record the names of books read by individual students and make this information available to classroom teachers, and (4) label Title I materials as they arrive and log this material in and out as it is used by students or teachers.

We agree that the library aides do benefit the Title I reading program the same as they benefit all the programs in a particular school. Also, the duties as described by the LEA above benefit all the children that use the library, not just educationally deprived children.

The LEA response did not, however, address the basic issue that library aides are provided with local funds in non-target schools. Nor did the LEA make mention of the fact that all schools in the district have library aides and that library usage is incorporated into the regular school program.

We do not believe that the library aide program as implemented by the LEA met the special supplementary provisions of the Act. Instead this program is merely providing a service to target schools that is provided to non-target schools with local funds.

Art Specialist Teachers

During fiscal years 1969 to 1971, the LEA has expended over $1.2 million of Title I funds to provide art specialist teachers to target schools. Art specialist teachers were also provided with Title I funds in fiscal years 1972 and 1973. As designed and implemented, however, the program was not specifically related to the special educational needs of educationally deprived children and therefore did not meet the supplemental requirement of the Act.

Art specialist teachers were assigned to a specific school. They devoted more time on the fourth, fifth and sixth graders and then rotated through the entire school. Furthermore, specific children were not identified, since the LEA felt that it would be harmful to segregate the children. This program as implemented was serving the entire classrooms and/or schools.

The LEA provided some art teachers to all schools with local funds. During fiscal year 1971, for example, the LEA provided 13.5 full time equivalent art teachers to 19 target area schools and 23.1 full time equivalent

art teachers to 26 non-target area schools with local funds. Title I funds were used to provide art teachers to 90 target schools, 26 non-public schools, and three non-target schools. The qualifications for employment were the same for the Title I and school district funded art teachers. Also, both teachers were instructed to follow the elementary art guides published by the school district.

In our opinion this program is not in accordance with Title I regulations section 116.17(g) and (h) cited in the section on library aides.

LEA Comments

The LEA did not address the issue raised in our report in its written response. The LEA did state that the services provided are not identical to the operating budget program. However, the job descriptions and art manual used by the art specialist teachers in target and non-target schools were identical. Furthermore, the reply indicated that the Title I program was mainly concentrated on children in grades 4, 5 and 6. The LEA did not mention how educationally deprived children were selected or that only educationally deprived children were served by the program.

We conclude that the art specialist program did not provide additional supplemental services to educationally deprived children. But, the program merely provided a service to all children in a particular target school that children in other target and non-target schools were receiving with local funds.

Teacher, Kindergarten And Counselor Aides

From fiscal years 1969 to 1971 over $2.7 million of Title I funds have been used for teacher aides. This activity was implemented at the inception of the Title I program. The project as approved, however,

was not sufficiently related to the special educational needs of educationally deprived children. Moreover, the LEA provided teacher aides to non-target schools with local funds. In fiscal year 1971 the LEA planned to provide 16.4 full time equivalent aides to project area schools and 19.5 full time equivalent aides to non-project area schools with local funds while Title I funds were used to provide 240 aides to project area schools. Officials at the LEA indicated that the duties of all aides were identical. The LEA also provided teacher aides with fiscal year 1972 and 1973 Title I funds.

The LEA has been providing kindergarten aides to project area schools with Title I funds since 1965. At the same time, the LEA has been providing kindergarten aides with local funds to non-project area schools. During fiscal year 1971 approximately 18 aides were provided with local funds to non-target schools while Title I funds were used to provide aides to selected target schools on a ratio of one aide to every two teachers.

From fiscal year 1969 to 1971 Title I funds amounting to almost $1.4 million have been expended for the services of the kindergarten aides. The aides performed auxiliary educational work providing supported services to kindergarten teachers under the direct supervision of the teachers. The duties and assignments of the aides were not designed to contribute particularly toward meeting one or more of special identified educational needs of educationally deprived children. Instead, the services provided by the aides benefitted all children on an equal basis in the class to which the aides were assigned.

Title I funds amounting to $353,990 have been expended for the services of counselor aides from fiscal year 1969 to 1971. The duties of the aides were to provide clerical and routine interviewing

services for counselors, answering general questions posed by students, parents, and past-graduates and routing these people to the appropriate counselor. They were responsible for serving as receptionists and for typing a variety of material involved with the counseling process. In our opinion, the duties of the counselor aides were not directly related to the special educational needs of educationally deprived children. Moreover, the LEA provided counselor aides to non-target area secondary schools with local operating funds. In fiscal year 1971 the LEA planned to use local funds to provide one counselor aide to a target school and nine aides to non-target area schools. Title I funds were used to provide counselor aides to 21 target secondary schools in 1971. Officials at the LEA indicated that the Title I aides and locally funded aides performed identical duties. During fiscal years 1972 and 1973 Title I funds were also used to provide counselor aides to target schools.

LEA Comments

In their reply the LEA contends that these three types of aides were providing special services to educationally deprived children and that these services were not the same as services being provided in non-target schools. In the case of teacher and kindergarten aides the LEA stated "Teacher with peak enrollment or with overcrowded classrooms need supportive assistance if they are to spend more time teaching and give more attention to individuals and small groups of pupils."

Further, the LEA stated "Recent evaluations indicate that counselor aides facilitated access to counseling services to a great extent in all cases by reducing the waiting time of clients to a median of two minutes. Their specific involve-

ment in the counseling process varied with the needs of the particular schools. However, a large part of their activity involved the giving of immediate and direct service to pupils, parents, teachers, social workers, and others who came into or telephoned the counseling office."

The LEA comments on the assignment utilization of Title I paid aides were not sufficiently directed to the issues involved. The LEA did not mention how the aides identified and met the specific needs of educationally deprived children. The comments, as stated in our report, indicated that the aides were benefiting entire classrooms or the student body at large in a school. Moreover, in the case of teacher and kindergarten aides, the comments indicate that the aides were necessary to reduce the pupil/teacher ratios because of overcrowded classrooms.

In our opinion the aides were benefiting an entire classroom or school, which is contrary to Title I regulations. Furthermore, we do not believe Title I was intended to relieve overcrowded conditions but instead Title I was intended to provide supplementary services to identified educationally deprived children.

HARRISBURG LEA

The Harrisburg LEA proposed and implemented an outdoor education program with Title I funds. The program was designed to provide a real-life setting for acquiring creative outdoor skills, for attaining concepts about human and natural resources, and for learning that man is dependent on his environment for his existence. Instead of being concentrated on a limited number of educationally deprived children and designed specifically to meet their identified needs, the LEA made this activity available to all children from kindergarten through fourth grade and the entire sixth grade. Records

were not available at the LEA to determine the amount of Title I funds actually expended on this program.

LEA Comments

> The LEA stated that the School District has documented the needs of its children by teacher observation, cumulative inventory gain folders and standardized test data to support the implementation of its Title I programs.

We agree that the LEA determined that outdoor education was a fourth priority need. Outdoor education was listed as a need for 2,651 children in December 1969. However, the program was used to benefit 6,414 children during the 1970/71 school year. Title I was intended to benefit identified educationally deprived children, not all the children in a grade or school.

The LEA agreed that the outdoor education activity served all children from kindergarten through fourth grade and the entire sixth grade. The LEA reply stated:

> "It is impossible to take only selected students from a classroom for full days at a time and not seriously damage the ongoing curriculum and create an emotional problem in those "left out" by loss of peer group learning values. Such a procedure creates the possibility that additional children will then develop a need for special services. Segregating children for short periods of time for special assistance is one thing, but for full days is another. Also the teacher is not part of the program because he/she is not actively involved. This, in turn, defeats any "spin-off potential".

Title I requires that programs be designed to meet the most pressing needs of educationally deprived children. In our opinion a program that can not be designed to meet the needs of only educationally deprived children should not be funded with Title I funds.

SCRANTON LEA

Title I funds totaling $292,115 have been expended by this LEA from fiscal years 1968 to 1971 to support a learning resources cooperative program. This program was continued by the LEA in fiscal years 1972 and 1973. Under the program, four paraprofessionals were employed to provide general library services to all children in four target and five non-target schools. The same type of general library services were provided to the non-target schools by seven library assistants paid with local funds. Furthermore, a summer library program was conducted to which all elementary school children in the district were invited to participate. (See Exhibit F)

The program also provided various types of non-print materials which were made available to all schools in the city. An analysis of schools utilizing non-print materials during the 1970-71 school year showed that target elementary schools used 30 percent, non-targeted elementary schools used 37 percent and secondary schools used 33 percent of the films loaned.

In our opinion the activities conducted under this program were serving all the children in a school and/or the entire school district contrary to Title I regulations. The Scranton LEA did not submit a reply to the draft report. Therefore, LEA comments are not included in this report.

ALBERT GALLATIN AREA

The Albert Gallatin Area School District received about $1.4 million in Title I funds for fiscal years 1971 through 1973. We identified $310,770 (22 percent) of the funds as being spent for general education type activities. Elementary Art, Music and Physical Education teachers were funded for $254,500 and Librarians and Library Aides were funded for $56,270. In our opinion

these programs served all children in the district and were not limited as required by Federal regulations to educationally deprived children.

Art, Music And Physical Education Teachers

The LEA funded elementary art, music and physical education teachers in fiscal years 1971 through 1973 as follows:

	1971	1972	1973	Total
Art	*(1) $ 6,800	(4) $25,700	(6) $ 41,000	$ 73,500
Music	(2) 12,700	(3) 19,800	(5) 36,600	69,100
Physical Ed.	(5) 37,900	(5) 34,000	(5) 40,000	111,900
Totals	$57,400	$79,500	$117,600	$254,500

* Denotes number of teachers.

We interviewed four teachers (two music, one art, and one physical education). The four teachers informed us that they gave instruction to all children in the school to which they were assigned. Each teacher stated that they did not attempt to identify educationally deprived children but considered all children within their assigned school as educationally deprived.

In our opinion, these projects were not approvable projects because they did not meet the Title I criteria of meeting the specific needs of identified educationally deprived children. Furthermore, the SEA reviewers continued to approve these projects, even after the LEA was requested to support the fact that the projects were not supplanting State and local funds or general aid, but failed to do so.

Librarians And Library Aides

In fiscal years 1971 through 1973 the SEA approved projects providing for the expenditure of Title I funds amounting to about $56,270. The LEA used these funds to employ librarians and library aides to provide general library services to the LEA's elementary schools.

We interviewed one librarian and two aides. The librarian informed us that she was the only elementary librarian in the LEA during fiscal year 1973. Her duties include, (1) working with entire classrooms at different schools and (2) working with individual children sent by their teachers. She stated that she cannot identify the educationally deprived children and that she treats all children the same. The two library aides informed us that their major duties consisted of (1) keeping the library open in the absence of the librarian, (2) helping any student find books, (3) checking books in and out, (4) shelving returned books, (5) keeping the card catalog up to date, and (6) cataloging new books. Neither aide had any knowledge of which children were eligible for Title I.

We discussed the SEA's approval, review and monitoring of the above project with SEA officials and reviewers. The SEA reviewer stated that based on our description of the project it was obvious that he had not performed any special review and monitoring of the project prior to approval. Furthermore, LEA officials informed us that a SEA reviewer had questioned the use of library aides in the Title I program. However, because the reviewer did not say to discontinue the project, the LEA left the project in their application and it was subsequently approved by the SEA.

In our opinion the duties performed by the librarian and aides are general in nature and benefit all children in the school district. Furthermore, if the SEA had performed a closer review and monitoring prior to approval, we believe that the project would have been recognized as general aid to the LEA.

LEA Comments

The LEA stated in a reply to our draft report that:

> "The shadow of poverty extends to nearly 50 percent of the pupils in the public school who can be classified as educationally and culturally deprived. The

socio-economic level of the district is considered to be very low. To meet the needs of these disadvantaged children, we provided enrichment activities in art, music, and physical education to the entire population because we do not have the advantage of being in an area where the children see great art exhibits, musical performances, and physical education facilities, etc."

"The basic premise of the librarian's interview stating that she cannot identify the educationally deprived children and treats all the children the same, is true".

"If you were a student in one of these schools, never been in a library before you are then educationally deprived to the point of not knowing anything about library resources, materials, etc."

"If the Albert Gallatin Area School District were to adhere strictly to the 'letter of the law', we would be able to make only limited use of Title I funds."

As indicated by the above excerpts from the LEA reply, the projects implemented under Title I were serving all the children in the LEA. Title I regulations require that projects be designed to serve only identified educationally deprived children, and not service the needs of a school district at large. Furthermore, at the conclusion of our review at the LEA, the art, music, and physical educational programs were redesigned to serve only identified educationally deprived children. In our opinion the projects described in this report were not designed in accordance with Title I regulations and therefore should not have been approved by the SEA.

MCKEESPORT LEA

We identified activities involving the expenditure of about $341,711 (29 percent out of a total of $1,169,897) in fiscal years 1971 to 1973 funds that were for general

type programs and not tailored to contribute particularly toward meeting one or more of the special educational needs of educationally deprived children.

Furthermore, a SEA evaluation team visited the McKeesport LEA to evaluate the LEA's Title I program. The report issued in May 1972, by the team was critical of the LEA because the Title I program could not be distinguished from the regular LEA program. The LEA was advised to adjust the Title I program in order to receive future Title I fund . The LEA superintendent disagreed with the team's recommendations and did not adjust the Title I program.

The LEA submitted the fiscal year 1973 application without any changes in the projects criticized by the SEA evaluation team. The SEA reviewer approved the application on August 16, 1972 without requiring the LEA to change the questionable projects.

Curriculum Coordinators

The McKeesport LEA expended Title I funds totaling $212,531 from fiscal years 1971 to 1973 for curriculum coordinators. The LEA had not established a job description for curriculum coordinators. A review of school records indicated that the curriculum coordinator function was equivalent to the functions performed by principals and vice-principals. For example, the LEA issued a memorandum to elementary school principals on January 11, 1973, in which four Title I curriculum coordinators were listed as school principals. We also interviewd two curriculum coordinators and they informed us that their duties consisted of (1) giving teachers ideas and guidance and (2) performing administrative functions necessary to run an assigned section of a school or an entire school. Both coordinators agreed that they performed the duties of principal or vice-principal and that their duties benefitted the entire school not just educationally deprived students. In addition, an SEA evaluation team noted that

the curriculum coordinators were actually school principals and vice-principals.

It is our opinion that use of Title I funds to employ principals and vice-principals to perform duties which benefit all students does not meet the compensatory requirements of the Act. Furthermore, the funding of principals and vice-principals is the responsibility of the LEA.

Library Services

The SEA approved the expenditure of $80,451, during fiscal years 1971 to 1973, for librarians and librarian aides. This project was approved in fiscal year 1973 although the SEA evaluation team reported that services of Title I staff members are falling on all children. Moreover, a Title I funded librarian informed us that services were provided to all teachers and students and benefitted the *entire* school population.

In our opinion this project as implemented did not contribute specifically towards meeting the special educational needs of educationally deprived children. Instead, all the children in the schools served by the librarians and aides benefitted from the services provided.

Clerical Personnel

During fiscal years 1971 through 1973 Title I funds totalling $48,729 were used to hire four clerical personnel. Our review of the duties performed by the clerks showed they were administrative functions which were not related to the Title I program.

. . . Secretary for the Assistant Superintendent of Elementary Schools—This position was listed on the Title I application as a clerical position. However, the position was filled by the secretary for the Assistant Superintendent of Elementary Schools. The duties performed were of a secretarial nature and involved all the elementary schools in the district and were not related to Title I matters.

... Secretary—This position was listed as a clerical position on the approved application. The position as filled was for a secretary to the (1) supervisor of special education, (2) attendance officer, (3) home and school visitors, (4) speech therapists, (5) counselors, (6) psychologists, (7) nurses, and (8) dental hygienist. The duties were of a secretarial nature and served the above individuals who worked with all the children in the school district.

... Audio-Visual Clerk—This individual was in charge of the audio-visual department for all the elementary schools in the McKeesport Area District. The audio-visual materials were available to all the elementary teachers within the LEA.

... Secretary to the Career and Placement Coordinators —Served the career and placement coordinators in the high school. This service was available to all students and benefitted the entire student body.

In our opinion the above positions were not related to Title I services nor serving educationally deprived students. These positions were general administrative type positions and should have been funded with State and local funds. We noted that after we discussed the general nature of the positions with LEA personnel the positions were not included in the fiscal year 1974 application.

LEA Comments

The LEA comments did not specifically address the points raised in our report. The comments were general in nature and did not defend the projects questioned by us.

> "There is criticism of services and a suggestion that money was improperly spent. It is implied that disadvantaged children were not served. This is not correct. We feel very strongly that the services being criticized were most effective in dealing with disadvantaged children."

"We feel that our Title I activities are legitimate and within the guidelines of the Elementary and Secondary Education Act."

We agree that projects providing services to entire schools or districts do benefit disadvantaged children. But because they equally benefit those that are not disadvantaged, the projects are not eligible as Title I activities.

EXHIBIT B

PITTSBURGH LEA

Schedule of Schools Listed on Application as Eligible Title I Target Schools That Were Not Eligible

	1967-68		1968-69		1969-70			1970-71			1971-72	
Name of School	(A)	(B)	(A)	(B)	(A)	(B)	(C)	(A)	(B)	(C)	(A)	(B)
Beltzhoover	94	11			207	13	$ 35,615					
Chartiers	30	11						85	20			
Clayton	67	12			166	13	28,055					
Columbus	106	13										
Davis	27	11										
East Street	58	13	89	13	89	13	549					
Fairywood	48	11	77	12	77	12	21,572					
Fort Pitt	122	10			233	13	21,882					
Friendship	112	12	128	11	128	11	13,226					
Fulton	125	12	84	8								
Gladstone	95	12	147	12	147	12	13,428					
Grandview	127	11	197	11								
Greenfield	122	13	169	11	169	11	23,224	112	13	$ 21,261	39	9
Hays	51	12	51	12	51	12		110	24	132		
Holmes	103	11	155	13	155	13	20,642					
Larimer	71	11	138	14	138	14	51,224					
Lemington	134	11	180	11	180	11	26,152					

Liberty	125	11	125	11								
Lincoln	74	11	139	14	139	14	28,927					
Morse	63	11	118	12	118	12	4,966					
McCleary	103	11	110	11	110	11	6,896					
McNaugher	132	13	132	13	132	13	4,146					
Northview	119	10			217	13	58,817					
Phillips	132	12			213	12	21,006					
Regent Square	18	12										
Rogers	130	10	176	13	176	13	45,746					
Sheraden	125	8			220	8	20,672	291	21	17,675	139	15

(A) Number of children from low-income families

(B) Percent in school

(C) Amount of Title I funds expended

PITTSBURGH LEA

	1967-68		1968-69		1969-70			1970-71			1971-72	
Name of School	(A)	(B)	(A)	(B)	(A)	(B)	(C)	(A)	(B)	(C)	(A)	(B)
Spring Garden	80	11	114	12	144	12	13,493					
Spring Hill	54	11	54	11	54	11	966	125	24	$ 198		
Illegible	127	8	173	9	173	9	26,756					
Centerville	129	12	129	12	129	12	172					
Madison			169	17	169	17	22,936					
Mann			105	14								
Fairview			56	12	56	12	8,321					
Illegible			79	11	79	11	18,345	159	24	16,158		
East Park			113	22	113	22	19,232					
Fortes			142	21	142	21	27,189					
Conroy			157	20	157	20	25,836					
Illegible			187	19	187	19	91,367					
Schiller					219	17	30,552					
Salear					216	15	24,332					
Manchester					216	17	89,611					
Stevens					214	13	41,366					
Illegible					206	14	79,091					
Terron Hill					219	17	88,741					
Carrick	140	7	140	7	140	7	13,410				149	7
Columbus Middle	109	13	109	13	109	13	57,281					
Freefield	50	12	50	12	50	12						
Perry	136	8	136	8	136	8	14,888					

Prospect Jr.	124	11	124	11	124	11	12,877					
Knoxville Jr.			174	8	174	8	81,573					
Conroy			117	20	117	20	65,981					
Carrick Sr.								475	17	7,079		
Peabody Sr.								925	21	27,468		
Totals		36 Schools		44 Schools			$1,301,061	8 Schools		$89,971	3 Schools	
District wide percent from low-income		14		19		21.9			25			28
District wide average number from low-income		158		200		234.8			261.8			272.2

(A) Number of children from low-income families

(B) Percent in school

(C) Amount of Title I funds expended

Notes: 1968-69 15 schools eligible under percent method—35 were eligible under number method. Therefore, 36 were ineligible under combination method.

1969-70 17 schools eligible under percent method—23 were eligible under number method. Therefore, 44 of 67 schools were ineligible under combination method.

1970-71 63 schools eligible under percent method—58 were eligible under number method. Therefore, 8 of 71 schools were ineligible under combination method.

PITTSBURGH LEA

Title I Funds Expended at Schools Not Listed On Application as Eligible Target Schools

School	1969-70 Funds Expended	1970-71 Funds Expended
Grandview	$13,695	
Liberty	720	
Mann	1,096	
Morrow	14,240	
Prospect Elementary	14,270	
Halls Grove	1,928	
East Carnegie	550	
Minedio	5,590	
Sunnyside	90	
Westwood	849	
Wrightman	1,050	
Connelly Voc.	1,436	
Washington Education Center	22,439	$ 165
Arsenal Middle		7,334
Knoxville		93
South Hills		720
Total	$77,953	$8,312

EXHIBIT C

SCHOOLS LISTED BY PHILADELPHIA AS TARGET SCHOOLS

	FY 1971				FY 1970			FY 1969		FY 1968	
Name of School	(A)	(B)	(C)	(D)	(A)	(B)	(C)	(A)	(B)	(A)	(B)
Dunlap	140	21	$ 23,659	$ 7,130							
Barry	250	20	29,065	18,858	253	18	$ 23,575				
Harrity	150	20	25,633	16,880	184	18	17,933				
Holmes					280	18	19,245				
Anderson					181	15	19,500				
Catherine					128	15	23,884				
Warrington					146	15	16,522				
Longstretch					99	15	17,289				
Mitchell					96	15	31,308				
Patterson					154	15	25,383				
Powel					51	15	5,688				
Bead					16	15					
Sayre					261	15	53,697				
Illegible					327	15	21,303				
Martin					38	18	17,086				
Poe					86	15	7,357				
Stanton					112	15	66,266				
Wayne					85	15	11,616				
A. Yare					95	18	18,819				

Name of School	FY 1971 (A)	(B)	(C)	(D)	FY 1970 (A)	(B)	(C)	FY 1969 (A)	(B)	FY 1968 (A)	(B)
McCall					85	15	19,972				
Fell	130	22	22,459	3,057	88	13	13,771	88	13	88	13
Thomas					176	18	21,496				
McIntyre					190	18	34,350				
Stokley					80	18	15,195				
Walton					214	18	47,402				
Stanton					228	15	41,012				
Whittier					177	15	13,223				
Brown					108	18	14,185				
Conwell					83	18	15,218				

(A) Number of children from low income

(B) % of children

(C) Title I Funds budgeted

(D) HEWAA Traced expenditures

SCHOOLS LISTED BY PHILADELPHIA AS TARGET SCHOOLS

Name of School	FY 1971 (A)	FY 1971 (B)	FY 1971 (C)	FY 1971 (D)	FY 1970 (A)	FY 1970 (B)	FY 1970 (C)	FY 1969 (A)	FY 1969 (B)	FY 1968 (A)	FY 1968 (B)
Ludlow					177	18	$ 71,653				
Moffet					85	18	40,619				
Richmond					108	18	4,576				
Sheppard					113	18	13,113				
Welsh					133	18	54,351				
Willard					69	13	20,165				
Adair					103	15					
Clyner					173	15	42,596				
Martranft					61	15	26,473				
Carroll	40	20	$ 8,983		24	14	6,351	24	14	24	14
Kensington					207	15	62,975				
Kelley	200	23	70,215	32,501							
Mastbaum					211	15	34,760				
Kister					112	18	94,892				
Pastorius					108	15	33,399				
Cramp	100	15	15,853	3,184	124	18	12,177				
Illegible	80	15	26,210	12,569	87	18	22,160				
Sheridan					93	18	16,967				
Soedley					114	18	16,284				
Webster					61	18	24,380				
Wright	90	20	27,045	20,882	80	18	27,300				
Edmunds					124	15	7,365				
Lawton	80	14	22,651	11,144	79	15	19,088				
Marshall	80	17	10,659	3,815	60	15	4,576				

Name of School	FY 1971 (A)	(B)	(C)	(D)	FY 1970 (A)	(B)	(C)	FY 1969 (A)	(B)	FY 1968 (A)	(B)
Sullivan	120	19	15,237	8,504	92	15	9,990				
Taylor	80	16	28,520	3,565	74	15	23,562				
Harding					268						
Welsh	350	19	52,415	20,874		18	22,483				
Totals	14		$378,604	$162,963	54		$1,344,550				
District Wide I			24.5				20.0		15.3		15.14
District Wide Average			400				334		236		107.4

Note—We were only able to determine salary charges in 70-71.

EXHIBIT D

SCHEDULE OF INELLIGIBLE SCHOOLS McKEESPORT LEA

School	1970-71 # children low income	1970-71 % low income	1970-71 Salary Title I	1971-72 # children low income	1971-72 % low income	1971-72 Salary Title I	1972-73 # children low income	1972-73 % low income	1972-73 Salary Title I
McClure	96	8.5		97	8.5		99	8.54	
Lincoln	32	9.0		28	8.8	$ 4,980	11	3.48	
White Oak	95	9.4		85	9.2		55	6.02	
Fawcett	28	10.0		25	10.0	12,672	34	13.28	
Third Street	27	10.23		22	9.8		5	2.29	
Senior High	353	10.75		346	10.74		215	6.82	
Eleventh Ward	45	12.13		36	12.20		22	7.74	
Versailles-Walnut	53	12.80	$15,733	43	12.75	12,480	46	13.85	
Versailles-Avenue	62	12.81		49	12.56		79	19.41	
Illegible	20	13.51		21	13.46		14	9.03	
Grandview	75	14.37		63	14.54		56	13.02	
McKeesport	276	15.06		254	15.02		281	15.78	
Greenwood	54	15.84		39	15.60		31	12.10	$16,683
G. Washington	105	16.0		90	15.87		97	18.37	
Highland	46	17.56		37	17.28		29	13.30	
West Side	61	18.43		52	18.24		67	24.10	
Centennial	285	31.18		206	31.11		182	27.61	
Fifth Avenue	91	32.16		77	31.79		64	26.32	
Model	191	34.05		132	33.93		114	27.60	
			$15,733			$34,132			$16,638
Avg. No. per school attend. area = 105					89			79	
Districtwide % — 14.7%					14.2%			12.5%	

$65,548 = FYs '71 - '72 - '73

$50,815 = FYs '72 - '73

ALLENTOWN LEA 1972-73 SCHOOL YEAR

School	# Children From Low Income	% Low Income Children	# Children Bussed From Target Areas	# Children in Title I Reading Program	# Bussed Children in Reading Program	Reading Teachers Salary
Stevens	27	9.0	1	23	0	$ 6,689
McKinley	29	9.0	18	16	3	See Jackson
Garfield	25	9.0	8	20	2	See Stevens
Cleveland	42	9.0	8	20	1	10,923
Lincoln	29	9.0	18	20	2	See Lehigh Pky.
Wilson	15	7	12	18	5	See Union Terr.
Washington	25	7	6	20	0	See Cleveland
Ritter	44	7	23	27	6	6,769
Jefferson	64	7	34	19	0	7,531
Jackson	35	7	17	18	1	6,769
	31	3	24	17	2	See Jefferson
Lehigh Pky.	11	3	14	25	4	6,769
Union Terr.	20	3	16	27	1	5,979
Midway Manor	8	3	14	12	3	See Ritter
Muhlenberg	26	3	23	20	4	[1]
Totals			236	302	34	$51,429

Salary costs were only costs incurred.

District Wide %—9.1 Target Method A

Average Number per School Attendance Area—76

Note—LEA designated these schools as ineligible

[1] This school shared a teacher with a target school—money not included in finding.

EXHIBIT A

SCRANTON LEA

Dear Parent:

Your child ——————————, who is enrolled in the elementary grades of our city schools, is invited to participate in a new program to develop reading good literature as a [illegible] use of leisure time.

You are probably aware that the school year will end on Friday, June 18th and that summer school will open July 6th. It is our hope that in this three week period, your child will want to have available a number of good books to enjoy should there be an abundance of free time. We feel that the reading habit and reading skills can be lost if there is no material easily available.

Therefore, through the Learning Resources Cooperative Program of Title I, a number of school libraries will be kept open and staffed on the closing day of school, Friday, June 18th, between 9:00 a.m. and 12:00 non. At this time, your child may borrow several books, paperbacks, magazines and other available library materials for that three week period when schools will be closed.

These materials may be returned when summer school opens and the full program is again in operation. We are enclosing a copy of the library schedule for your convenience.

Please encourage your child to be a part of this worthwhile opportunity since we are certain that short, daily periods of reading provide educational enrichment, satisfying relaxation and meaningful recreation.

Very truly yours,

/s/ Anthony F. Musso
ANTHONY F. MUSSO
Program Coordinator

/s/ Mary B. Kelly
MARY B. KELLY
Library Supervisor

APPROVED:

EUGENE M. LANGAN
Acting Superintendent

SCHEDULE OF PROGRAM COSTS BY FISCAL YEAR AND
AMOUNT QUESTIONED FOR REFUND BY SEA

PROGRAM	FISCAL YEARS 1968	1969	1970	1971	1972	1973	TOTALS	AMOUNT QUESTIONED AS REFUNDABLE
NIA								
ry Aides	$673,073.96	$632,649.35	$1,019,116.77	$231,947.86			$2,556,787.94	$2,556,787.94
olor Aides		80,642.53	158,391.54	114,954.86			353,988.93	353,988.93
rtem Aides		483,674.26	748,222.50	153,309.65			1,385,206.41	
Specialist Teachers		485,856.01	656,255.88	102,785.06			1,244,896.95	
or Aides		994,749.26	1,515,272.69	241,118.31			2,751,140.26	
l General Aid							$8,292,020.49	$2,910,776.87
gible Schools				$162,963.00			$ 162,963.00	$ 162,963.00
NG								
r Education - Unable to Determine Expenditures								
D								
ving Resources	$ 83,571.00	$ 68,589.00	$ 77,523.00	$ 62,432.00			$ 292,115.00	
ELLATIN AREA								
				$ 6,800.00	$25,700.00	$41,000.00	$ 73,500.00	$ 73,500.00
l Education				12,700.00	19,800.00	36,600.00	69,100.00	69,100.00
ry				37,900.00	34,000.00	40,000.00	111,900.00	111,900.00
l General Aid				15,740.00	15,740.00	24,790.00	56,270.00	56,270.00
							$ 310,770.00	$ 310,770.00
PORT								
iculum Coord.				$ 40,400.00	$73,031.00	$99,100.00	$ 212,531.00	$ 212,531.00
ry Services				23,848.00	32,252.00	24,351.00	80,451.00	80,451.00
ical Personnel				16,612.00	13,416.00	18,701.00	48,729.00	48,729.00
l General Aid							$ 341,711.00	$ 341,711.00
gible Schools					$34,132.00	$16,683.00	$ 50,815.00	$ 50,815.00

EXHIBIT G
Page 1 of 2

SCHEDULE OF PROGRAM COSTS BY FISCAL YEAR AND
AMOUNT QUESTIONED FOR REFUND BY SEA

PROGRAM	FISCAL YEARS 1968	1969	1970	1971	1972	1973	TOTALS	AMOUNT QUESTIONED AS REFUNDABLE
[illegible]								
[illegible]gible Schools			$1,301,061.00	$ 89,971.00			$1,391,032.00	$1,391,032.00
[illegible] Not on Application			77,953.00	8,312.00			86,265.00	86,265.00
[illegible]							$1,477,297.00	$1,477,297.00
[illegible]								
[illegible]gible Schools						$45,639.00	$ 45,639.00	$ 45,639.00

EXHIBIT G
Page 2 of 2

APPENDIX I

[SEAL]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
Harrisburg, Pennsylvania 17126

Commissioner for basic education June 28, 1974

Mr. G. A. Rafalko
Regional Audit Director
Department of Health, Education
and Welfare
HEW Audit Agency
P.O Box 13716
Philadelphia, Pennsylvania 19101

Dear Mr. Rafalko:

The following is the response of the Pennsylvania Department of Education of the ESEA Title I audit control number 40003-03 for the period July, 1967 through June 30, 1973. Our response is organized according to the outline of the Draft Report.

Introduction

No specific comments.

Background

No specific comments.

Scope of Review

No specific comments.

Highlights of Audit Results

Our comments in later sections of this paper relate to several results. However, the third paragraph of that sec-

tion contains what we feel are serious misunderstandings concerning general aid and supplemental services. It is the position of this Department that where specific buildings have very high percentages of children scoring below the national average on standardized tests of basic skills and/or tests of cultural deprivation that the charge of general aid in those buildings is completely inappropriate. We believe the auditors concentrated solely upon the material available in the applications dealing with the percentages of formula children. No statistics or information were available to those auditors concerning the extent of educational deprivation. Attached to this letter are extensive and detailed responses from the several school districts against whom specific charges of general aid have been made. We believe that these responses clearly demonstrate that where districts verify the overwhelming extent of educational deprivation in a given school that a charge of general aid should be completely dropped.

Moreover, the allegation that programs did not meet the goal of concentrating supplemental compensatory education benefits on educationally deprived children is refuted by the attached reports. These reports indicate adherence to Section 116.1 (i) and 116.17 (f) of the Federal Regulations for Title I programs as well as a definition of "educationally deprived child" set forth in U. S. Office of Education Question and Answer Booklet, "Programs for Educationally Deprived Children." It is the position of the Department of Education that this set of definitions allows school districts to reach beyond basic academic subjects by giving them considerable latitude in serving the broad range of activities to combat poverty, neglect, deliquency, handicaps, and cultural, economic, ethnic and linguistic isolation from the general community. Meeting more than one of the special educational needs of these children is in conformity with Section 116.17 (g) of the Federal Regulations. It must be remembered that the services excepted to by the auditors were all in addition to

more fundamental educational programs being provided by the LEA's through Title I funds.

Findings and Recommendations

The second paragraph on page 4 is not accurate. Despite the fact that there was a major reorganization of the Pennsylvania Department of Education in December 1972 which transferred the Division of Compensatory Programs to the Bureau of Special and Compensatory Education, the Division remained under the operational control of the Bureau of Planning and Evaluation until June 30, 1973. Although page 4 of the draft report alludes to involvement of the 16 EDC's in the planning and consultation with the LEA's, this responsibility ceased upon conclusion of fiscal year 1972 (August 1972).

Our comments on page 5, second paragraph are as follows:

Currently, project application review procedures rest solely with the Division of Compensatory Programs through a team of seven reviewers (soon to be 12), each of whom has responsibility for 60 to 70 ESEA Title I applications. The Pennsylvania Department of Education believes that existing review procedures are of sufficient depth to assure that program funds are expended in accordance with Title I regulations and guidelines. As a result of program and fiscal reviews, every effort has been made to alleviate the possibility of error within the application review procedures, the most critical of which are reviewed by a number of ESEA Title I staff members. For example, the target method of each school district is reviewed by five and frequently six staff members including:

Administrative Assistant
Budget/Fiscal Reviewer
Audit Clerk
ESEA Title I Reviewer
Senior Program Officer (upon occasion)
Division Chief

Although the margin for error within a single application is considerable, the Title I office is continually striving to perfect the overall application review procedures. In addition, U. S. Office of Education recommendations for improvement in the administration of Title I, by way of annual monitoring visits is recognized by the State Education Agency as an ongoing activity. Our responses to the written recommendation from U. S. Office of Education contained positive actions which the Department is or has taken to rectify any weakness in administration procedures which have been brought to our attention by the U. S. Office Monitoring Team.

Programs Implemented Provided General Aid

The audit report states that, "In most cases, the LEA Title I application indicated that the projects were providing general aide." The SEA, without equivocation, states that in no case was a project knowingly approved which indicated general aid was intended rather than direct or supportive service for educationally disadvantaged children. What has occurred, we believe, is a serious misunderstanding between auditors and Title I reviewers about the nature and intent of Title I.

We believe that the "indications of general aid" that the auditors are talking about stem from the close examination by the auditors of the percent of economically disadvantaged children believed to be in a given building. This is the information which appears in an application. The auditors apparently completely equate "economically disadvantaged" with "educationally disadvantaged." For example, on page 30 of the report under *Conclusions and Recommendations*, the auditors begin by stating, "The effectiveness of the Title I program in meeting the special educational needs of *economically* deprived children." Thus, it becomes very natural for an auditor to lecture the SEA in the report about the part of the Title I regulations which addresses itself to tailoring projects toward meeting one or more special educational needs and not de-

sign projects merely to meet the needs of schools or of the student body at large in a school or in a specified grade in a school, since the auditors apparently consider only a limited percent of children in each building to be eligible.

Since nearly all the buildings in the five districts accused of improperly spending funds on page 12 report percentages of economically disadvantaged children, 60 per cent or less, it is no wonder the auditors look askance at services such as library assistants, counselor aides, art, music, physical education, curriculum coordinators, and clerical perssonel as indications of general aid.

However, since Title I is not a "poor person' " program, but a program for educationally disadvantaged children who may need a broad range of services to stem or combat educational disadvantagement, the severely limiting economic percentages can *not* be used to determine to what extent services should be available within the eligible buildings. It is the position of the Department of Education and the U. S. Office, we believe, that it is the extent of educational deprivation and the nature of that deprivation among students within the eligible buildings, as determined by a needs assessment, which, in the final analysis, determines which services shall be offered.

It is our contention that within those districts chosen for audit by HEW, the extent of educational deprivation in individual buildings is only generally perceived by reference to percentages of economically disadvantaged children within the building. For example, in Philadelphia where the broadest and most far reaching charges of general aid have been made in the specific buildings where general aid is alleged, the overwhelming majority of children were scoring well below the national norms on all available standardized measures and were in dire need of all types of supportive services. Well above 70 percent of the children in the buildings where Title I services were offered were below national norms, as evidenced by standardized tests in basic skills. It was the position of the Department that a cafeteria of services needed to be avail-

able to help those children. This was a position generally shared by educators during the period 1968-1972. We continue to believe that where overwhelming numbers of educationally disadvantaged children are concentrated within specific buildings, the special educational needs of these children are identified as being the needs of children within that building and the charge of general aid is inappropriate particularly where the evidence clearly indicates that districts did not and do not have the resources to supply these supplemental services with their general funds. Library assistants, teacher aides, kindergarten aides and counselor aides are examples of supportive services most commonly attacked as general aid and which districts are able to fund in a most limited way. Furthermore, it had been the position of the Department reviewers at that time that the district could slowly pick up supportive services with local funds as local funds became available. That position has been corrected by program auditors from the U. S. Office within the last two years and this type of supplanting as it is now called, has been stopped.

Another aspect of general aid referred to in terms of the five districts is that art, music and physical education teachers funded at the elementary level represented supplantation because of Pennsylvania General Curriculum Regulations requiring art, music and physical education programs at the elementary level. However, that argument becomes invalid because art, music and physical education programs at the elementary level were more commonly offered by the elementary teacher, not a specialist. These programs are minimal at best. The employment of an art, music and/or physical education teacher/specialist in elementary buildings with overwhelming percentages of educationally disadvantaged youth represented a supplementary service in the years 1968-1972. Probably one of the most significant signs of the general success of Title I is the willingness of urban districts to pick up with their limited resources, services now considered essential, but

formerly considered supplementary. Without a doubt, it was Title I funds which enabled the Philadelphia School District to employ its first elementary art and music teachers. The art and music teachers employed with district funds represents the initial attempts of the district to begin picking up what was, at the beginning, a purely federally funded program. The Department refuses to believe that the U. S. Office regulations are intended to be punitively enforced against districts who improved their offerings to children in this manner. These same comments, of course, apply to the several other categories supporting services, almost none of which existed before Title I.

The Philadelphia School District is extensive in detailing evidence of educational deprivation over the years in question, the buildings in question and the programs in question.

The attached documents fully explain the actual facts surrounding the allegations of general aid. However, in brief, the errors of the auditors can be characterized as follows:

a) Failure to differentiate screening from actual program participation.

b) Failure to note differences in program content and intensiveness between Title I programs and other LEA programs.

c) Insistence that serving all children in a district or school is "general aid" despite the fact that all or nearly all were economically and educationally disadvantaged. This has special significance in attacking cultural deprivation (Section 116.1 (i) of Federal Regulations).

d) Failure to consistently indicate that in cases of alleged general aid of a "cultural education" nature, that districts were spending most of their Title I money on reading, math, etc. for eligible students.

> The draft report makes little or no mention of this, leaving the reader with the impression that art, music, physical education and libraries are the only items being funded by Title I.

More complete explanations of all the "general aid" challenges are contained in the attached documents and are included herein by reference.

Additionally, the audit report indicates that "In most cases, the LEA Title I application indicated that the projects were providing general aid." The SEA states without equivocation that in no instance was a project knowingly approved which indicated that general aid was being provided. We also disagree with the statements made in the first paragraph on page 7 because they are unwarranted generalizations not supported by specific information and we further contend that there is no such supporting information. In only a few limited instances did projects get approved where previous reviewers had instructed districts to stop certain activities, and these can be directly attributed to necessary shifts of personnel, plus differing opinions about the legality of certain practices. Where projects were to be discontinued for the following year, the time frame was usually in the late spring when the recommendations were made.

We disagree with the statement on page 6 about SEA not requiring LEA to submit needs of children in order of priority. Please see the attached instructions.

Conclusions and Recommendations

On page 12 we asked that reference be made to verifying sums alleged to be improperly spent. It is imperative that USOE reconsider the retrieval from school districts of so-called "improperly spent Title I funds" until such time as the Pennsylvania Department of Education conducts its own review of the HEW audit findings. Then, and only then, can mutual agreement be realized in the finalization of the HEW audit report. In addition, it is

essential that OE review the written responses to the HEW audit report, as prepared by the respective school districts.

I would also add that there does not seem to have been a pragmatic consideration of the problems involved in implementing programs in severely distressed districts. Serving children with multiple needs using limited resources is a difficult task and one which must be reviewed in a fashion more cognizant of the specifics of the program, as well as the problems being faced by the school administrators as they attempt to lawfully expend Title I funds.

Need for Improvements in Methods Used to Evaluate Selections of Target Schools

I have no specific comments.

Program Requirements

I have no specific comments.

Submitted Proposals Included Many Ineligible Schools

I have no specific comments.

Expenditures at Non-Target Schools

No specific comments; however, the LEA's mentioned as examples have prepared specific and detailed responses which are attached hereto.

Continuing Weaknesses in SEA Review Procedures

We question statements about desegregation and eligible schools. During the period of time covered by this audit, certain school districts were under court orders concerning the State Human Relations Commission to desegregate their schools. Among these were Pittsburgh, Harrisburg, Chester-Upland, Philadelphia, Erie City, York City, Norristown Area, Coatesville Area, Wilkinsburg Bor-

ough, Aliquippa Borough, McKeesport Area, Farrell Area, Southeast Delco, Clairton City, Penn Hills Township, Allentown City, Washington, Duquesne City, New Castle Area, Greater Johnstown Area and Central Dauphin. Consequently, in an effort for the Title I program of the above school districts to have a positive effect on their desegregation programs and primarily because of the dispersal of minority group children throughout the district, the Title I office in effect recognized these districts as being able to declare the entire school district as an eligible attendance area. We submit that within that eligible district only educationally disadvantaged children were served, subject to the types of situations described in our comments on general aid. I would again refer to Program Guide # 64 of the Federal Office which encourages the state and local education agencies to do nothing that would encourage segregation. I again refer you to the attached specific comments of the school districts which are involved in your conclusions and recommendations section.

Need for More Management Emphasis on Project Evaluation

I have no specific comments.

Approved Projects Did Not Include Clearly Stated Education Objectives

The statement concerning identifying needs on a primary basis is inaccurate in paragraph three, page 25. See attached guidelines for 1970-71.

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF EDUCATION
Washington, D.C. 20202

Jun. 11, 1976

Our Reference: ACN: 50006-02
Honorable Fred G. Burke
Commissioner of Education
State Department of Education
Trenton, New Jersey 08625

Dear Commissioner Burke:

Reference is made to the Health, Education, and Welfare Audit Agency report of audit of the operation and administration of the Title I, Elementary andy Secondary Education Act program as it relates to the Selection of Target Areas in the Newark LEA in your State for the period September 1, 1970 to August 31, 1973.

The decisions set forth in this letter are based on a thorough examination of the audit report and all information your agency has submitted for purposes of resolving the pending audit exceptions including its most recent response of May 7, 1976. We are not in a position to announce our final determinations with respect to those unsettled matters included in the above-cited audit report. Our decision is that it will be necessary for your agency to refund $1,161,917 to the Office of Education in order to settle this audit. In Enclosure No. 1 to this letter, you will find a detailed discussion of our determinations.

If your agency concurs with our final determinations, you should submit payment in the amount of $1,161,917 to the U.S. Office of Education. Should your agency wish to ap-

peal our final decision, you may request a hearing. The procedure for a hearing on appeal of final audit determinations is contained in Enclosure No. 2 to this letter.

Sincerely,

/s/ Robert R. Wheeler
ROBERT R. WHEELER
Deputy Commissioner
for School Systems

Enclosures

Enclosure No. 1

FINAL AUDIT DETERMINATIONS

Audit Control No: 50006-02

State: New Jersey

Program: Title I, ESEA

Period Covered: September 1, 1970 to August 31, 1973

SELECTION OF TARGET AREAS—$1,161,917

The auditors' review disclosed that the Newark LEA used Title I funds totaling $1,161,917, in school years 1970-71 and 1971-72, in schools which did not meet the eligibility requirements established in Section 116.17 of the Title I regulations. The auditors asserted that critical review of project applications for these periods by officials of your agency and the LEA would have disclosed information gaps and a lack of detail on the methods used to determine eligibility of school attendance areas. The auditors indicated that although source data in support of the 1970-71 eligibility determinations were not available, it was clear on the face of the project application for that year that one school, based on the low-income percentage shown, was improperly classified as eligible and received $91,266 in Title I program funds. The auditors noted that during school year 1970-71, ten schools received $41,021 in Title I funds even though they did not appear on the LEA's approved project application and were, therefore, ineligible. The auditors also discovered that in school year 1971-72, the Newark LEA, by using improper ratios, misclassified 13 schools as eligible to receive $1,029,630 in Title I funds. The breakdown is as follows:

Expenditures by Ineligible School (Lafayette) Shown as Eligible in Project Application—$91,266

The auditors found that because the LEA failed to retain the essential documentation, the reliability of the districtwide percentage of low-income children, stated in the application of 25.5 percent, could not be confirmed. In addition, the auditors could not validate the low-income percentage computed for each attendance area. The auditors, therefore, could not determine which of the 74 schools listed in the Title I application were actually eligible for Title I funds. However, they noted that among the schools included in the application there was one, the Lafayette Street School, which on the face of the application showed a low-income percentage of 23.5 percent, which was two full percentage points below the stated districtwide average of 25.5 percent. The auditors, therefore, concluded that the use by this school of $91,266 in Title I funds was in violation of Section 116.17(d) of the Title I regulations. Your agency's earlier responses regarding this matter were reviewed and determined to be inadequate. Your agency's latest response, dated May 7, 1976, does not refute the auditors' finding. Instead it states that your agency had verbally "cited" the district regarding its target area selection source material and apparently "considered the poor economic environment in Newark at that time" as an adequate basis upon which to approve the expenditure of Title I funds. This response is clearly not adequate to refute the auditors' finding and, in fact, supports their contention that your agency's review of target area selection processes was deficient. Therefore, your agency must refund the sum of $91,266 to the Office of Education.

Expenditures by Ten Ineligible Schools Excluded from Application—$41,021

The auditors' review disclosed that during school year 1970-71 ten schools, which were not eligible to receive

Title I funds because they were not listed on the Title I application as constituting Title I school attendance areas, expended Title I funds totaling $41,021 in violation of Sections 116.17(a) and (c) of the Title I regulations. Your agency's earlier response to this finding was inadequate. The supplemental response of May 7, 1976, does not attempt to refute the auditors' finding. It merely asserts that your agency has encountered difficulty in developing a response to the auditors and requests the documentation used in their review. In view of the fact that your agency (1) has direct access to the Newark LEA's target area selection material, (2) indicated in your earlier response (December 10, 1974) that it had already reviewed the material in question, and (3) failed to request copies of the audit workpapers at the exit conference or at the meeting held in Washington, D.C., on November 19, 1975, or during the period which passed between that meeting and your supplemental response, we do not feel that it is appropriate to delay resolution of this matter further. Therefore, your agency must refund the sum of $41,021 to the Office of Education.

Expenditures Due to Improper Identification of Eligible School Attendance Areas—$1,029,630

The auditors found that the method used by the Newark LEA to determine the eligibility of attendance areas for school year 1971-72 deviated from that set forth in Title I regulatory mandates, particularly Section 116.17(d) of the Title I regulations. The LEA utilized AFDC statistics from the County Welfare Board which listed the total number of children in the AFDC category enrolled at each regular public elementary and secondary school. These statistics, however, were incomplete since they excluded those children on AFDC rolls who were attending nonpublic, or special educational schools or who had dropped out of school. The limitations of the statistics suggested to the LEA the use of an alternative ratio pre-

sented in ESEA INST. L203.1, section 1.1. This section recognized that in some instances (as did not exist in Newark during the period in question) schools may not have well-defined attendance area boundaries or receive numbers of children from outside the areas that have been designated to those schools. In such cases, it may be necessary to use a ratio for ranking attendance areas which is based on the percentage or number of children from low-income families actually enrolled in those schools rather than the number of such children eligible to attend the public school serving that attendance area. The auditors pointed out that while the former ratio was not permitted to be used by the LEA under ESEA INST. L203.1, it was a reasonable alternative under the circumstances.

However, the auditors found that in its attempt to apply the selection system described by INST. L203.1, the LEA devised hybrid ratios which deviated from the method specified. The auditors revealed that the ratios utilized by the LEA had basic mathematical flaws which tended to inflate the low-income percentages for individual elementary and secondary school areas and thus to increase improperly the number of eligible attendance areas. Based on their recalculation of the target area selections for the Newark LEA, the auditors determined that ten elementary schools and three secondary schools had low-income percentages lower than the district wide average and were ineligible for Title I funding. The auditors recommended that your agency be required to refund the $1,029,630, which represents the Title I funds expended at schools which were determined to be ineligible to receive such funds.

Your December 10, 1974, response to the auditors was based on the assertion that the auditors only utilized AFDC data in arriving at their recalculation rather than the several sources listed in the Newark application and that the number of children identified as eligible was too low. In support of your agency's position, is the pertinent

page of the Newark LEA project application. However, this document clearly states that "the criterion used in qualifying schools based on statistics on Aid for Families of Dependent Children was supplied by the Essex County Welfare Board." It further states that, "Before selecting this method for qualifying attendance areas and schools with those areas the following data (those noted in your response) were also examined." In view of the obvious support which your submission gave to the auditors' recalculations, we could not accept your earlier response as adequate to refute their findings.

Your agency's supplemental response of May 7, 1976, provides an ex post facto recalculation of the target area selection figures for the schools found to be ineligible by the auditors. However, your response states that your agency used in the denominator of its calculations "the Elementary School enrollment *plus the percentage of students attending the Junior High and High School from that eligible attendance area.*" (emphasis supplied) This is exactly that same type of improper count which gave rise to the initial audit exception and which this Office has already indicated is not permissible under the regulations or INST. L203.1. Therefore, your agency must refund the sum of $1,029,630 to the Office of Education.

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF EDUCATION
Washington, D.C. 20202

May 18, 1976

Our Reference: ACN: 50000-03
Honorable John C. Pittenger
Secretary of Education
State Department of Education
Harrisburg, Pennsylvania 17126

Dear Secretary Pittenger:

Reference is made to the Health, Education, and Welfare Audit Agency report of audit of the operation and administration of the Title I, Elementary and Secondary Education Act program in your State from July 1, 1967 through June 30, 1973.

The decisions set forth in this letter are based on a thorough examination of the audit report and all information your agency has submitted for purposes of resolving the pending audit exceptions, particularly the response submitted January 23, 1976. We are now in a position to announce our final determinations with respect to those unsettled matters included in the above cited report. Our decision is that it will be necessary for your agency to refund $1,346,399 to the Office of Education in order to settle this audit. In Enclosure No. 1 to this letter, you will find a detailed discussion of our determinations.

If your agency concurs with our final determinations, you should submit payment in the amount of $1,346,399 to the U.S. Office of Education. Should your agency wish to appeal our final decision, you may request a hearing. The

procedure for a hearing on appeal of final audit determinations is contained in Enclosure No. 2 to this letter.

Sincerely,

/s/ Robert R. Wheeler
ROBERT R. WHEELER
Deputy Commissioner
for School Systems

Enclosures

Enclosure No. 1

FINAL AUDIT DETERMINATIONS

Audit Control No: 50000-03

State: Pennsylvania

Program: Title I, ESEA (Follow-Up)

Period Audited: July 1, 1976 through June 30, 1973

IMPROVEMENTS NEEDED IN SEA's ADMINISTRATION OF PROGRAM

The auditors' review disclosed that your agency's examinations of project applications were not performed in sufficient depth to assure that program funds were expended in accordance with Title I regulations and guidelines.

Programs Implemented Provided General Aid

The auditors found that eight LEAs expended over $9.2 million in Title I funds for projects which as approved and implemented failed to meet the special educational needs of educationally deprived children because they met the needs of schools or of student bodies at large in a school. This, the auditors pointed out, is in violation of Section 116.17(g) of the Title I regulations. The auditors also found some instances in which the activities in the LEAs supplanted State and local funds, in violation of Section 116.17(h) of the Title I regulations. The breakdown is as follows:

Philadelphia LEA (FY 1971)—$346,903
Library Assistants (FY 1971)—$231,948

Title I funds, totaling $231,948, were expended during FY 1971, as well as earlier, to pay salaries of libarary as-

sistants whose routine clerical and mechanical duties were associated with the overall operation of the libraries rather than directed at the special educational needs of educationally deprived children. Your agency's response of January 23, 1976, states that your review of the FY 1971 project application neither confirms nor refutes the auditors' findings. It bases your refutation of the auditors' findings on the assertion that *Guidelines: Special Programs for Educationally Deprived Children, OE-35079,* would have countenanced this program and that guidelines and regulations in effect at the time were vague and did not require job descriptions for project approvals. We do not consider this general response to be an adequate refutation of the audit finding, nor does it demonstrate that the activities of the library assistants in question did not meet the needs of the schools or student bodies at large. The LEA material in this matter, which makes the unsupported assertion that the library assistants provided direct service to educationally deprived students, is not sufficient to cause a modification of our earlier position on this matter. Therefore, your agency must refund the sum of $231,948 to the Office of Education.

Counselor Aides (FY 1971)$114,955

The auditors' review disclosed that during FY 1971, $114,955 in Title I funds were expended to provide counselor aides whose general clerical and interveiwing services for counselors were serving the needs of the school populations at large. In addition, the auditors found that the counselor aides' services supplanted State and local funds available for counselor aides. Your agency's position with regard to this finding is the same as its position on the library assistants, although in this case it also asserts that the duties of the Title I-funded and non-Title I-funded counselor aides were dissimilar. This generalized response is not adequate to refute the auditors' finding. With regard to the duties of the Title I and non-

Title I counselor aides, neither your agency nor the LEA presents any evidence or documentation tending to demonstrate that the Title I students in the target schools received services over and above their fair share of the counseling services normally provided through State and local funds. Therefore, your agency must refund the sum of $114,955 to the Office of Education.

Albert Gallatin Area LEA (FY 1971 and 1973)—$310,770

Art, Music, and PE Teachers (FY 1971 to FY 1973)—$254,500

The auditors found that $254,500 in Title I funds were expended from FY 1971 to 1973 for art, music, and PE teachers who were giving instruction to all children in the school to which the teachers were assigned. In addition, the auditors pointed out that your agency itself was apparently concerned that this program was supplanting the State and local effort. Your agency's response with regard to the general aid aspects of this finding is based on the assertion that large percentages of low-income children were present and that OE-35079 recognized that some projects by their nature tend to benefit all children. However, the mere presence of large numbers of low-income children is not controlling in the Title I program which is designed to serve only the educationally deprived children from such areas. Again it must be pointed out that regardless of the *implications* contained in OE-35079 in 1966, the Title I regulations in effect at the time these particular programs were operated clearly preclude the provision of services which meet the needs of the student body at large in a school. The LEA responses on this matter are similar to those of the SEA; however, they add the contention that the program cited by the auditors is the same as one disseminated as exemplary by OE and that the auditors did not visit the program while it was in

operation. The facts and material presented by the LEA, however, are insufficient to support the first of these contentions, and regardless of the timing of the auditors' visit, no substantive refutation of their findings is presented by the LEA. In view of these factors and the absence of adequate documentary material to refute the audit finding, your agency must refund the sum of $254,500 to the Office of Education.

Librarians and Library Aides (FY 1971 to 1973) —$56,270

The auditors' review disclosed that $56,270 in Title I funds were expended for a librarian and library aides whose duties were general in nature and benefited all children in the school district. Your agency's response to this finding is the same as that for the art, music, and PE teachers. The LEA response is similar but also states that it is the LEA's position that, "all children in our area should enjoy the benefits of the (Title I) program." In view of our position as stated above and the LEA's remarks, we support the auditors. Therefore, your agency must refund the sum of $56,270 to the Office of Education.

McKeesport LEA (FY 1971 to 1973)—$341,711
Curriculum Coordinators (FY 1971 to FY 1973)— $212,531

The auditors found that in the McKeesport LEA, $212,531 in Title I funds were expended for curriculum coordinators who were performing duties of school principals and vice-principals and whose services benefited entire schools rather than only the educationally deprived children in those schools. Your agency's response adopts that given by the LEA and states that your agency presumed, "that the positions in question were supplementary in nature and provided services to identified, disadvantaged children." The LEA response states that the curriculum coordinators were necessitated by problems

generated by racial integration of concentrations of disadvantaged children and the need to prepare programs and materials for use by the educationally disadvantaged students in the schools. However, the curriculum coordinators' job descriptions, which had been presented by the LEA was not included in your agency's response, and there was no documentary evidence in support of the LEA's contention that the curriculum coordinators' services were used "primarily" for Title I children. Therefore, your agency must refund the sum of $212,531 to the Office of Education.

Library Services (FY 1971 to 1973)—$80,451

The auditors' review disclosed that your agency approved the expenditure of $80,451 in Title I funds for librarians and library aides whose services were provided to all teachers and students and benefited the entire school population. Your agency's response relies on the LEA's position and provides no specific information with regard to this finding. The LEA's response asserts that the Title I-funded library services were provided primarily to eligible Title I participants and that if others benefited it "was merely a spin-off." The LEA also asserts that the Title I participants received services above and beyond those granted other children in the district; however, neither of these assertions is supported by any documentation. In the absence of any documentation adequate to refute the auditors' findings, your agency must refund the sum of $80,451 to the Office of Education.

Clerical Personnel (FY 1971 to 1973)—$48,729

The auditors found that $48,729 in Title I funds were expended to pay for the services of four clerical persons whose administrative duties were only remotely connected to the Title I program and whose salaries should have been provided with State and local funds. Your agency has

provided no specific response to this finding and relies instead on the responses provided by the LEA. The LEA responses generally assert that the clerical services in question were necessitated by various educational needs of Title I program participants. However, there are no samples of the documents allegedly kept by these clerks for Title I students or which demonstrate an activity in response to the program participants' needs. In the absence of any documentation, which is adequate to support the LEA's assertions or refute the auditors' findings, your agency must refund the sum of $48,729 to the Office of Education.

In addition to the recommended refund pertaining to Title I funds being used to benefit entire school populations or to supplement State and local funds, we support the auditors' recommendations that your agency: (1) develop and implement procedures for more indepth review and analysis of project proposals; (2) require LEAs to immediately revise or terminate projects which your agency's reviewers identify as containing activities not in accordance with program criteria, and establish appropriate followup procedures to assure that necessary revisions are made in a timely manner; and (3) disapprove LEA proposals that provide for the use of Title I funds for activities which merely meet the needs of schools or of the student body at large in a school or in a special grade in a school.

NEED FOR IMPROVEMENT IN METHODS USED TO EVALUATE TARGET AREA SELECTION—$347,015

Proposals Included Many Ineligible Schools

The auditors' review of project proposals submitted by 24 LEAs for FY 1978 through 1971 showed that 15 of the LEAs had proposed, and received SEA approval, to designate as eligible and conduct Title I activities in 409

schools that did not meet established criteria. SEA approval was given though information included in the project application showed the schools selected had concentrations of children from low-income families below the districtwide average. The auditors specifically mentioned the McKeesport, Wyoming Valley, and Hazelton LEAs in connection with this condition. No response to this section of the report was provided by your agency or by any of the LEAs involved. We support the auditor's recommendation that your agency place additional emphasis on the review and evaluation of schools selected by LEAs in relation to established criteria.

Expenditures at Non-Target Schools—$250,561

Pittsburg LEA (FY 1971)—$98,283

The auditors' review disclosed that during FY 1971 the Pittsburgh LEA designated a total of eight schools ($89,971) as eligible to participate in the Title I program even though they had concentrations of children from low-income families below the districtwide average and were, therefore, not eligible Title I schools. The auditors were unable to determine why the schools in question were selected since there were no records or other target area selection data available. In addition, the auditors identified four schools ($8,312) at which expenditures of Title I funds were made even though the schools in question were not listed on the Title I project application as eligible to participate in the program. Your agency's response points out that it was aware of difficulty the LEA was having obtaining hard data for target area selection. In addition, your agency's response states that the SEA "chose to disregard the statistics on the application in favor of the more compelling reality of the alternate data," which is a clear violation of Section 116.17(d) of the Title I regulations. The LEA response recounts the

difficulties in obtaining hard target area data for the early years of the program but states that the first hard data was available for FY 1971 programs. Samples of such data are provided with the LEA response. Although your agency asserts that adequate data did not become available until the close of FY 71, no documentation is provided in support of that assertion. In the absence of such documentation, we must support the auditors' recommendation with regard to the $89,971. Neither the SEA nor the LEA has responded with regard to the $8,312 questioned by the auditors. In view of these factors, tending in fact to support the auditors' findings, we support the auditors' recommendations. Therefore, your agency must refund the sum of $98,283 to the Office of Education.

Philadelphia LEA (FY 1971)—$152,278

The auditors found that the LEA expended Title I funds, totaling $152,278, for salaries of personnel assigned to schools that had not been designated by the LEA on the project application as attendance areas eligible to participate in the Title I program. The auditors noted that the $152,278 had been identified in a limited review of payroll records conducted by the Comptroller's Office of the City of Philadelphia. The thrust of both your agency's response and that of the LEA is directed at justifying expenditures in schools which fall below the districtwide average, not at justifying expenditures in schools not listed by the LEA as eligible to participate. Therefore, it appears that the responses are directed at the funding of $162,963 of improper expenditures in a different finding which we pointed out in our preliminary determination letter of August 26, 1975, were unrecoverable due to the Statute of Limitations. Our review of the material contained in your agency's response of January 23, 1976, has not revealed any discussion of documentation directed at resolving the matter of the $152,278 questioned by the auditors. Therefore, your agency must refund the sum of $152,278 to the Office of Education.

Continuing Weaknesses in SEA Review Procedures—$96,454

The auditors' review disclosed that although information appearing on the face of various project applications revealed that some schools were ineligible to participate, your agency's project application review procedures continued to permit the selection for participation in the Title I program of schools which were ineligible. The auditors cited the following examples:

McKeesport LEA—$50,815

The auditors found that the McKeesport LEA indicated that the entire district qualified as a target area in Fiscal Years 1972 and 1973. However, the percentage of children from low-income families in the various attendance areas of the district ranged from 8.5 percent to 33.9 percent in FY 1973, and from 2.29 percent to 27.6 percent in FY 1972. Your agency had established criteria which stated that in order for a school district to designate all schools as part of a target area, the percentage of children from low-income families in each school should not vary by more than 8 percent. McKeesport was not eligible to use this method, and its officials stated that the entire district was considered a target area because of the desegregation plan implemented by the LEA.

The LEA response, included in your agency's January 23, 1976, submission, provides no additional relevant data on this matter. Your agency's response seeks to justify the LEA's action by citing page 17 of *Title I, ESEA: Selecting Target Areas, Handbook for Local Title I Officials*, which states, "*children who reside in eligible attendance areas* but by specific arrangement because of desegregation, attend schools serving ineligible areas, may be considered for participation in the Title I program in the integration plan has been terminated" (emphasis supplied). This statement clearly applies only to provision

of services for specific children from eligible attendance areas and cannot be utilized as a basis for designating all schools in the district as eligible attendance areas without constituting a violation of Section 116.17(c) and (d) of the Title I regulations. It should also be pointed out that the "follow-the-child" modification of the clearly stated target area selection process was clarified in OE Program Guide # 44 dated March 18, 1968, and Program Guide #65 dated January 21, 1970. We, therefore, support the auditors' finding and recommendation, and your agency must refund the sum of $50,815 to the Office of Education.

Allentown LEA (FY 1973)—$45,639

The auditors' review disclosed that the Allentown LEA indicated on its FY 1972 and 1973 applications that 15 schools were ineligible but requested approval to provide reading services to 15 children in each of the ineligible schools since these children resided in target areas but were bussed to nontarget schools to achieve desegregation. Your agency approved the plan but only to serve children who lived in the target areas. The auditors visited the LEA and found that only 34 of the 236 students bussed in from target areas participated in the Title I program. These 34 students represented only 11.26 percent of the 302 total enrollment in the Title I reading program at nontarget schools. The auditors questioned that portion of the total expenditures which accrued to the benefit of ineligible students. Your agency's latest response attempts to stress the idea that the LEA was required by the State Human Relations Commission, and permitted by Program Guide # 64, to follow the bussed children with Title I services. This Office does not challenge this contention with regard to the 34 children identified by the auditors as educationally deprived residing in eligible attendance areas. However, neither your agency nor the LEA has been able to present an adequate justi-

fication for serving the remaining exceptionally high number of students who attended a nontarget school and resided in a nontarget area thereby violating Section 116.17 (a) of the Title I regulations. In the absence of information or documentation adequate to justify the services provided to these ineligible students, your agency must refund the sum of $45,639 to the Office of Education.

The auditors also mentioned problems with target area selection procedures in the Armstrong, Bentworth, and Albert Gallatin LEAs to which you agency made no specific response. We support the auditors' recommendation that your agency: (1) place additional emphasis on review and evaluation of schools selected by LEAs for participation in the Title I program, and (2) establish procedures to continuously monitor Title I activities to assure that programs are conducted only at eligible schools in a manner consistent with Title I regulatory mandates.

Enclosure No. 2

PROCEDURE FOR HEARINGS ON APPEAL OF FINAL AUDIT DETERMINATIONS

If, upon review of our final determinations, your agency wishes to appeal any of our decisions, you may request a hearing. Your request for such a hearing must be postmarked not later than 30 days after the postmark date of our letter of final determinations, except when the Chairman of the Office of Education Title I Audit Hearing Board grants an extension of time for good cause shown. The request for hearing is to be addressed to:

Chairman, Title I Audit Hearing Board
Office of the U.S. Commissioner of Education
U.S. Office of Education
Room 4003
Federal Office Building # 6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The detailed procedures for submitting a request for hearing, and for the processing and disposition of each such request by the Hearing Board, are set forth in the attached Notice as published in the *Federal Register*, Volume 37, No. 208, on October 27, 1972.

Attachment

Office of Education

AUDIT HEARING PROCESS

Establishment of Title I Audit Hearing Board

Pursuant to the authority contained in sections 201 and 204 of Reorganization Plan No. 1 of 1939 (4 F.R. 2728, 53 Stat. 1424), as amended by section 5 of Reorganization Plan No. 1 of 1953 (18 F.R. 2053, 67 Stat. 631), 20 U.S.C. 2; title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a; and section 434 of the General Education Provisions Act, formerly section 424 of the General Education Provisions Act, 20 U.S.C. 1232c as redesignated by section 301(a) of the Education Amendments of 1972, there is hereby established within the Office of Education a title I Audit Hearing Board as set forth below from which Audit Hearing Panels will be selected for the purpose of reviewing and providing hearings upon final audit determination made in the administration of title I of the Elementary and Secondary Education Act programs by the Office of Education.

The Department of Health, Education, and Welfare is currently studying the establishment of a Department-wide mechanism for consideration of grantee appeals from audit and other administrative determinations which may be applicable to audit determinations under title I. In view of the current pendency of a substantial number of audit reports and determinations (some involving relatively large amounts of funds) under title I, it is necessary and appropriate that a procedure for finally resolving these pending audit matters be established at this time.

NOTICES

Office of Education Title I Audit Hearing Board

Sec.

1. Scope.
2. Definitions.
3. Audit Hearing Board; Audit Hearing Panel.
4. Determinations subject to the jurisdiction of the Board.
5. Submission.
6. Effect of submission.
7. Substantive and procedural rules.
8. Hearing before panel or a hearing officer.
9. Initial decision; final decision.
10. Separation of functions.

Section 1—*Scope.* This notice applies to final audit determinations made by the Office of Education after June 30, 1971, with respect to programs funded under title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e). For the purpose of this notice, an audit determination by the Office of Education shall be considered final only after the grantee has been provided an opportunity to comment on a preliminary audit determination and has been notified in writing that a final audit determination has been made with respece to the matters included in such preliminary determination.

(20 U.S.C. 241a 1232c)

Sec. 2—*Definitions.* For purposes of this notice—

(a) "Board" means the Office of Education Title I Audit Hearing Board, as described in paragraph (a) of section 3.

(b) "Board Chairman" means the Board member designated by the Commissioner to serve as Chairman of the Board.

(c) "Panel" means an Audit Hearing Panel, as described in paragraph (b) of section 3.

(d) "Panel Chairman" means a member of an Audit Hearing Panel who has been designated as Chairman of such Panel by the Board Chairman.

(e) The terms "Department" and "Departmental" refer to the Department of Health, Education, and Welfare.

(f) "Commissioner" means the U.S. Commissioner of Education.

(g) "Grantee" means a State educational agency to which payments have been made under section 143 of the Elementary and Secondary Education Act.

(h) "Title I" means Title I of the Elementary and Secondary Education Act (20 U.S.C. 241a).

(20 U.S.C. 241a, 1232c)

SEC. 3—*Audit Hearing Board; Audit Hearing Panel.* (a) There is established, within the Office of the Commissioner, an Office of Education Title I Audit Hearing Board the members of which shall be designated by the Commissioner to perform the functions described in this notice. Subject to the limitations set forth in section 10 of this notice, persons who are officers or employees of the Department or of its constituent agencies as well as other Federal officers or employees may serve on the Board. Persons who are not otherwise full-time employees of the Federal Government may, in accordance with appropriate arrangements, also be asked to serve on the Board. Service on the Board may be on a regular or an intermittent basis.

(b) The Commissioner shall designate one of the members of the Board to be Chairman. The Board Chairman shall designate Audit Hearing Panels for the consideration of one or more cases submitted to the Board. Each

such Panel shall consist of not less than three members of the Board. The Board Chairman may, at his discretion, constitute the entire Board to sit as a Panel for any case or class of cases. The Board Chairman shall designate himself or any other member of a Panel to serve as Chairman.

(20 U.S.C. 241a, 1232c)

SEC. 4—*Determinations subject to the jurisdiction of the Board.* (a) Subject to section 5 and paragraph (b) of this section, the Board shall have jurisdiction in those cases in which a grantee under Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e et seq.) has been notified in writing that a final determination has been made by the Office of Education that an expenditure not allowable under the grant has been made by the grantee (or by a subgrantee to which it has made a payment under Title I) or that the grantee (or such subgrantee) has otherwise failed to discharge its obligation to account for grant funds.

(b) A determination described in paragraph (a) may not be considered by the Board unless the Deputy Commissioner for School Systems of the Office of Education has notified the grantee in writing of such determination. A notification described in the preceding sentence shall set forth the reasons for the determination in sufficient detail to enable the grantee to respond and shall inform the grantee of his opportunity for review under this notice. In the case of final audit determinations made prior to the effective date of this notice, the Deputy Commissioner for School Systems may designate those notifications which have previously been made to grantees and which he deems to comply with this paragraph. Upon receipt of notice of such a designation, the grantee shall be deemed to have received a notification for purposes of this paragraph.

(20 U.S.C. 241a, 1232c)

SEC. 5—*Submission*—(a) Application for review. (1) A grantee with respect to whom a determination described in section 4 has been made and who desires review may file with the Board an application for review of such determination. The grantee's application for review must be postmarked no later than 30 days after the postmark date of notification provided pursuant to section 4(b) except when the Board Chairman grants an extension of time for good cause shown.

(2) Although the application for review need not follow any prescribed form, it should clearly identify the question or questions in dispute and contain a full statement of the grantee's position with respect to such question or questions, and the pertinent facts and reasons in support of such position. The grantee shall attach to his submission a copy of the agency notification described in section 4(b).

(b) *Action by Board on application for review.* (1) The Board Chairman shall promptly send a copy of the grantee's application to the Deputy Commissioner for School Systems.

(2) If the Board Chairman determines, after receipt of an application for review, that the requirements of section 4 have been satisfied, he shall promptly refer the application to an Audit Hearing Panel designated pursuant to section 3(b) for further proceedings under this part. If he determines that such requirements have not been met, the Board Chairman shall return the application to the grantee with reasons for its rejection.

(20 U.S.C. 241a, 1232c)

SEC. 6—*Effect of submission.* When an application has been filed with the Board with respect to a determination, no action will be taken by the Office of Education with respect to the collection of the amount determined to be owing pursuant to such determination until such appli-

cation has been disposed of. The filing of the application shall not affect the authority which the Office of Education may have to initiate proceedings under section 146 of Title I.

(20 U.S.C. 241a, 1232c)

SEC. 7—*Substantive and procedural rules*—(a) *Substantive rules.* The Panel shall be bound by all applicable laws and regulations.

(b) *Precedural rules.* (1) With respect to cases involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each part to the proceeding an opportunity for presenting his case at the option of the Panel (i) in which or in part in writing or (ii) in an informal conference before the Panel which shall include provisions designed to assure to each party: (*a*) sufficient notice of the issues to be considered (where such notice has not previously been afforded) and (*b*) an opportunity to be represented by counsel.

(2) With respect to cases involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party an opportunity for a hearing, which shall include, in addition to provisions required by paragraph (b) (1) (ii), provisions designed to assure to each party the following:

(i) A transcript of the proceedings;

(ii) An opportunity to present witnesses on his behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(c) *Intervention by third parties.* (1) Interested third parties may, upon application to the Board Chairman, intervene in proceedings conducted under this notice. Such application must indicate to the satisfaction of the Board Chairman that the intervenor has information relative to

the specific issues raised by the final audit determination, and that such information will be useful to the Hearing Panel in resolving those issues.

(2) When third parties are given leave to intervene in accordance with subparagraph (1) above, such parties shall be afforded the same opportunities as other parties to present written materials, to participate in informal conferences, to call witnesses, to cross-examine other witnesses, and to be represented by counsel.

(20 U.S.C. 241a, 1232c)

SEC. 8—*Hearing before Panel or a hearing officer.* A hearing pursuant to section 7(b)(2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 241a, 1232c)

SEC. 9—*Initial decision; final decision.* (a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon, for submission to the Commissioner. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions upon which such decision is based and these findings and conclusions shall be incorporated in the initial decision.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party and intervenor, or his counsel, with a notice affording such party an opportunity to submit written comments thereon to the Commissioner within a specified reasonable time.

(c) The initial decision of the Panel shall be transmitted to the Commissioner and shall become the final decision of the Commissioner, unless within 25 days after the expiration of the time for receipt of written comments,

the Commissioner signifies his determination to review such decision.

(d) In any case in which the Commissioner modifies or reverses the initial decision of the Panel, he shall accompany such action by written statement of the grounds for such modification or reversal, which shall promptly be filed with the Board. Such decision shall not become final until it is served upon grantee involved or his attorney.

(e) The authority to review initial decisions shall not be delegated. Review of any initial decision by the Commissioner shall be at his discretion and shall be based upon such decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties to the proceeding, or by their counsel.

(20 U.S.C. 241a, 1232c)

SEC. 10—*Separation of functions.* No person who participated in prior administrative consideration, or in the prepartion or presentation of a case submitted to the Board shall advise or consult with, and no person having an interest in such case shall make or cause to be made an ex parte communication to the Panel, Board, or the Commissioner with respect to such case, unless (1) all parties to the case are given timely and adequate notice of such advice, consultation, or communication, and (2) reasonable opportunity to respond is given all parties.

(20 U.S.C. 241a, 1232c)

Effective date. This notice shall become effective 30 days after the date of its publication in the FEDERAL REGISTER.

Dated: September 27, 1972.

S. P. MARLAND, Jr.,
U.S. Commissioner of Education.

[FR Doc. 72-18345 Filed 10-26-72; 8:51 am]

[SEAL]

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
225 West State Street
Trenton, N.J.

OFFICE OF THE COMMISSIONER

October 21, 1976

Mr. Robert R. Wheeler
Deputy Commissioner
Office of Education
Department of Health, Education
and Welfare
Washington, D.C. 20202

Re: ACN: 50006-02 (Newark Board of Education, Title I Audit)

Dear Mr. Wheeler:

Enclosed please find the New Jersey State Department of Education's application for review of the "Final Audit Determinations" based upon an audit of Newark Title I programs for the period September 1, 1970 to August 31, 1973. Attached to that application is a copy of the agency notification.

Please note that by a letter dated August 23, 1976, David S. Pollen, Chairman of the Audit Hearing Board granted this agency an additional 60 Days in which to prepare and submit documentation to support its request for a hearing.

Sincerely,

/s/ Fred G. Burke
FRED G. BURKE
Commissioner

Attachments

NEW JERSEY DEPARTMENT OF EDUCATION
APPLICATION FOR REVIEW
OF FINAL AUDIT DETERMINATION
BASED ON ACN: 50006-02

October 21, 1976

INTRODUCTION

This is an application by the New Jersey Department of Education (State) for a review of final audit determinations of the Office of Education (OE) of the Department of Health, Education and Welfare dated June 11, 1976 and received by the State on June 28, 1976. The conclusions expressed in that communication were based largely on an audit of the use of funds in Newark appropriated under Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a *et seq.*, during fiscal years 1970-1973. The State expressed its desire to take an appeal from those determinations, and a hearing was requested pursuant to 45 C.F.R. 16 *et seq.* by a letter dated July 22, 1976. Appendix A.

The audit report on which OE's final determination was based was received by the New Jersey Commissioner of Education on October 21, 1974. The auditors recommended that the State refund Title I funds in excess of $1.1 million which were spent on schools allegedly ineligible to receive funds under federal law in the school years 1970-71 and 1971-72. The auditors asserted generally that the local educational agency (LEA) had misclassified as eligible a number of schools that did not satisfy the requirements of Title I regulations and that the state educational agency (SEA) had failed to act to prevent such improper use of program funds.

The State's initial response, dated December 10, 1974, provided an answer based on such data as were available. Thereafter, a meeting was held on November 19, 1975 between HEW and representatives of SEA. Neither the individuals who prepared the answer of December 10, 1974 nor those who met at HEW are now employed by SEA. Therefore, the State was under a considerable disadvantage when it filed its final response to the audit on May 7, 1976. It had been provided with no record of what transpired at that meeting. OE had also failed to furnish documentation which formed the basis of one audit exception. Since so much of the final determination is

couched in conclusory language, the State is still unable to make a meaningful response. By contrast, OE has been supplied with all relevant documentation at the State's disposal.

The final audit determination, requesting the return of $1,161,917 was based upon three specific audit exceptions: (1) expenditures by an allegedly ineligible school (Lafayette Street School) in school year 1970-71 ($91,266); (2) expenditures by ten schools not listed on the 1970-71 application ($41,201); and (3) expenditures due to identification of Title I target areas through an allegedly impermissible formula ($1,029,630). Each of these exceptions will be considered in some detail later in this application for review. However, it is sufficient to note here that the State, in its final response to the auditors, provided a recalculation for the supposedly ineligible schools for 1971-72 (the exception for which comprises the far greater part of the total amount requested). The formula used for that recalculation was permissible under regulations existing at the time of the application, and the accuracy of the statistics used is not challenged by OE. In short, there has never been as satisfactory rebuttal provided to the recalculation.

From this brief review of the history of this audit and application for review, as well as the contents of the preliminary audit report and final determinations, it is apparent that the State has been severely disadvantaged in its attempts to provide specific responses to each allegation. Also prejudicial to the State's effort is the passage of time taken between steps by the federal agencies. The State is faced with the task of meeting conclusions—some only partially supported by documentation, others supported not at all—based upon allegations contained in an audit report completed more than two years ago. The LEA applications containing the material commented upon in that report were completed, respectively, five and six years ago. It should also be noted that SEA officials attempted to administer those programs in the face of a con-

fusing, and often conflicting, mix of federal regulations and pronouncements.

Beyond the procedural objections stated above, the State is determined to defend the educational needs of the school children of Newark and to show the validity of Newark's Title I program during fiscal years 1970-73. Since the OE rebuttal to the State's last response is largely unsatisfactory, it is compelled to restate many of its objections to the preliminary audit report. In doing so, the State is confident of its ability to demonstrate the propriety of its actions and that it fulfilled its statutory mandate under both existing federal guidelines and the local conditions to which those guidelines were applied.*

DISCUSSION

It appears that OE has accepted virtually all of the conclusions arrived at by the auditors. Therefore, this application must be one for review of that audit report as well as of OE's final determinations. But before each specific finding is answered, it is essential that the circumstances surrounding the Title I program across the state and the general economic climate in Newark during the subject years be described.

Some of the difficulties uncovered by the audit were no doubt engendered by some degree of confusion in the administration of the program at all levels. State and local agencies were faced with conflicts between federal statutes and regulations governing the program and informal administrative pronouncements periodically issued to interpret them. During this early phase of Title I, there was a complete absence of clear regulations. Discrepancies between those existent have been well-documented elsewhere

* OE has never informed the State of the basis for its refund request although repeatedly asked to do so. The State is confident that it will prevail in this application, and therefore will not address the question of refunds at this time. However, it is aware of no authority for this refund procedure and reserves its right to challenge OE's authority to employ it at a later date.

and are thoroughly familiar to educators at the federal level.

The version of Title I which confronted the Newark LEA at the beginning of the 1970 and 1971 school years, through its lack of specificity, added to the confusion that attended the implementation of the law. It contained no clear definition either of the type of child Title I funds were to serve or the type of area to which they were to be applied. Federal regulations adopted pursuant to the Act provided some guidance, but were still lacking in specificity. For example, 45 C.F.R. 116.1 (i) defines "educationally deprived children" as:

> ". . . those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large."

and 45 C.F.R. 116.1(v) defines "project area" as:

> ". . . the attendance area, or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the location of the project itself, is designated as the area whose children are to be served by the project . . . ."

Neither the statute nor these regulations in effect during the relevant fiscal years sets forth precise criteria to be considered by an LEA in determining whether a child qualifies as "educationally deprived" and whether a project area contains a high enough percentage of low-income children so that it might be considered eligible.

The HEW audit agency apparently based its findings on AFDC data that OE, in its final audit determination, admitted were incomplete because they did not reflect the

total number of low-income families with school-aged children in the district. One suggestion for dealing with such unsatisfactory statistical information, offered by Harold Howe, U.S. Commissioner of Education, in the *ESEA Title I Program Guide #44*, was addressed to the chief school officers of all states:

> "In some cases, income data are not available or are out-of-date and the number of children from low-income families will need to be estimated on the basis of the number of such children who are receiving Aid to Families with Dependent Children (AFDC) or who are receiving free lunches. *Housing, health, or employment statistics may also be used in estimating the number of children from low-income families in each attendance area. . . .*
>
> Normally the attendance units should be ranked according to percentages of low-income families. . . . If necessary for reasons of equity the attendance units determined to have high concentration of low-income families may include some areas ranked on one basis and some on the other."
> (Emphasis added).

Eschewing complete dependence on such incomplete data, local Title I coordinators fell back on their own assessment of the needs of their districts and the locations of low-income populations. To a great extent, the Newark LEA depended on this practice, which was expressly approved of by Commissioner Howe in a letter dated February 27, 1967:

> "The degree of concentration from low-income families may be estimated, if better data are not available, on the basis, of the number or percentage of children from low-income families actually attending each of the schools being operated by the applicant local educational agency." (Emphasis added).

Other OE communications as well recognized the probable need for estimating data. In "The Schoolman's Guide

to Federal Aid, Part II. Implementation of Projects," reprinted from the December 1965 issue of *School Management* and distributed to all superintendents in January 1966, the director of program operations in OE's Bureau of Elementary and Secondary Education said the following about the problems in data collection:

> "Schoolmen shouldn't be struck with inaccurate data—and they are not. They can conduct their own poverty census and *they don't have to stick with the $2,000 income factor.* They can use some other factor, or factors, that serve their purpose better. For example: How many families have incomes under $4,000 a year? They can go to the welfare agency and find out how many children are on welfare programs. Even housing data will give valid clues. *All* of this type of data can give a valid index of poverty.
>
> If accurate information, even of this type, is not available for some schools, or for some attendance area, the superintendent can meet with the school principal and other personnel, put together whatever information they have and come up with a *pooled judgment* as to the schools with the highest concentrations of children from low-income families. This is acceptable but I want to stress that it should be used *only* as a last resort.
>
> For example, in order to qualify for participation in a Title I project, a school's attendance area must show a percentage of children from low-income families that is at least as high as the over-all percentage for the district. This is causing some trouble because administrators are finding that some of their concentrated pockets of poverty are in schools that do not, using available statistics, show a relatively high *percentage* of low-income children. In this situation the pooled judgment of the district's staff could be used to show that this particular school qualifies for

participation in a Title I program." (Emphasis original).

Also critical of OE's use of *only* AFDC as a determinant of eligibility is Report No. 93-805 on the Education Amendments of 1974 by the House Labor and Education Committee, which stated:

> "The committee bill has reduced the use of AFDC counts for distributing Title I funds because of the inequitable distribution of funds which has resulted in the last several years and also because we believe that the AFDC program in its present state does not provide accurate or reliable statistics on poverty throughout the country. Federal administrators of the program concur in this conclusion since they appeared before the committee and urged that AFDC statistics not be used for distributing funds." 1974 U.S. Code Cong. & Admin. News 4101.

The reason for this sudden loss of confidence was the realization that the welfare program left in the state a wide discretion to decide who is eligible and the amount of assistance granted to each such individual.

In addition, in a letter * dated June 14, 1974, to the New Jersey Title I Coordinator, Richard L. Fairley, Director of OE's Office for the Disadvantaged, recommended that the state agency instruct LEA's that besides primary source data (AFDC, census), weight should also be given to such secondary source data as unemployment and health statistics, school lunch data, and school surveys.

That this was done for the subject years is borne out by the Newark LEA applications, which evidence a conscientious effort to locate areas which had a high concentration of children from low-income families on the basis of the best information *then* available. For example, the 1970-71 application shows that the following factors,

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* See Appendix B, page 7.

all of which were approved of as criteria by OE, were utilized:

1) AFDC statistics supplied by the Essex County Welfare Board

2) Free lunch and free breakfast programs

3) Model Cities data

4) Housing statistics

5) Bussing of children from areas with high concentration of foreign-born and non-English speaking children

6) Health survey and statistics on school-age children.

In addition, Newark conducted its own survey to gauge the need for Title I-type aid. The Interim Progress Reports, Newark BOE Title I by Planners Associates, Inc. indicated that a large segment of Newark's school-age population fell below national norms in reading and mathematics. For example, a city-wide test administered in October 1969 indicated that an average of 80 out of 100 third-graders fell below the national norms. Among sixth-graders, the below average rate fell to 90 out of 100. Reported data also showed that a majority of children in *all* of the project areas suffered from at least one of the following educational handicaps:

1) insufficient knowledge of English

2) poor speech patterns

3) lack of an ability to communicate verbally with others

4) low levels of aspiration and self-esteem

5) health, home and cultural handicaps

With all of this considered, the reported AFDC District-wide low-income percentage for 1970-71 (25.5) is but a poor reflection of the conditions in Newark at that

time. It ignores in particular the aforementioned conditions and statistics considered by LEA and gathered from a variety of sources as well as the severe conditions of overcrowding in the elementary schools. Of the 82,314 children registered in Newark public schools during school year 1969-70, a majority, 51,886, were in grades kindergarten through sixth. As has been acknowledged often by educators, class size can be an excellent indication of the caliber of education.

Statistics cited in the 1971-72 Title I application are even more indicative of the climate of both the schools and the economy of Newark. They show a jobless rate for the previous year of 14 percent, a rate double that needed to qualify under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. And in 1971, the Model Cities program in Newark was expanded to include the entire city.

Other data further dramatize the situation in the city. Newark was then second only to Washington, D.C. in percentage of black population (54.2). Another 11 percent of the population was of Hispanic background. The city also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate.

One other statistic was especially considered by the local administrators and serves to show the inherent unreliability of any count of the city's low-income population. Newark had in 1970-71 the highest population turnover in the nation. Model Cities data indicate that mobility rates reached as high as 80 percent for schools in the Title I area. For this reason alone, LEA had no choice but to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served. Indeed, the type of Title I project ultimately developed was tailored to such a mobile population.

Then, as now, the city was faced with imminent bankruptcy. The entire school system was overburdened and hardly able to maintain the quality or quantity of services that would ameliorate the learning, health, and nutritional problems of its school children. Schools with relatively less disadvantaged students hardly had more opportunity to satisfy these needs.

It is also apparent that under the meaning of the Act and its scope, which Congress intended to have been broad, the whole of Newark could have been considered a Title I area.

In the 1965 House Committee Report on Public Law 80-10, later to become the Elementary and Secondary Education Act, it was said:

> "Under the terms of the legislation, a local public school district may use funds granted to it for the broad purpose of programs and projects which will meet the educational needs of educationally deprived children in those school attendance areas in the district having high concentrations of children from low-income families. It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district. What may be an acceptable and effective program in a school district serving a rural area may be entirely inappropriate for a school district serving an urban area, and vice versa. *There may be circumstances where a school system is basically a low-income area and the best approach in meeting the needs of educationally deprived children would be to upgrade the regular program.* On the other hand in many areas the needs of educationally deprived chil-

dren will not be satisfied by such an approach." 1965 U.S. Code Cong. & Admin. News 1454 (emphasis added).

The 1966 House Committee Report on amendments to Title I noted local problems in determining where and how Title I funds should be used in meeting the objectives of the program. The Committee repeated that Title I programs were to be designed at the local level and that the program was to be administered flexibility:

> "*We specifically pointed that there may be circumstances where a whole school system is basically a low-income area and in which the best approach might be to upgrade the whole school system.* The first year programs involving a general upgrading of whole school systems were discouraged by the Office of Education. The construction of facilities to house Title I programs was permitted only sparingly. This restricted approach was necessitated by limited funds. In the next two years, especially in fiscal year 1968, more funds will be available and more children will be included in Title I programs. It is expected that more general upgrading of school systems and more construction will be permitted. *It is the feeling of the committee that when 30 or 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded.*" 1966 U.S. Code Cong. & Admin. News 3846 (Emphasis added)

As has already been demonstrated, the Newark school system was one uniformly disadvantaged both educationally and economically. In school year 1971-72, AFDC data, which, if anything, understated the level of poverty in the district, showed a low-income percentage of over 33 percent, a level above that recommended by Congress in 1966 as one that should qualify the entire district as disadvantaged. Even the federal regulations applicable

that year, and so often cited in the preliminary and final audits, recognized that an entire school district could be considered a project area:

> ". . . *In certain cases, the whole of a school district may be regarded as an area having a high concentration of* [*children from low-income families*] *and be approved as a project area*, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district." 45 C.F.R. 116.17(d) (emphasis added)

With these regulations and pronouncements before them, Newark school administrators proceeded to try to determine the appropriate target areas. It is apparent that their program as a whole met the Title I requirements in serving educationally deprived children, who were demonstrated to have been both highly concentrated throughout Newark and highly mobile among attendance areas.

In fact, there is every indication that Newark was precisely the kind of school district for which the Act was written. The House Committee Report on the Title I amendments of 1974 notes that two types of districts should especially be the targets for Title I funds: 1) districts which are exerting a great tax effort and have a minimal tax base and 2) districts where education costs more because of expensive programs (such as bilingual programs) or because of student transiency in the district as a whole. Newark certainly qualifies as a district of the first type. Its tax base has been rapidly shrinking, and Newark taxpayers have traditionally been burdened with the State's highest property tax rate. The rate of transiency has already been noted. As for the demands for bilingual education in the district, an informal survey completed in October 1969 showed that 12 out of the city's 29 elementary schools had a non-English speaking population of 14.4 percent or more. Since then, there has been a rapid influx of Spanish speaking people.

All of the foregoing indicates that the Newark program as a whole was clearly designed to serve not the general educational needs of the area, but "the special needs of children from low-income families" and to counteract "the impact the concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs." 20 U.S.C. 241(a). Indeed, no statement made in either the preliminary audit or final determination alleges that these purposes were not served.

One other thread of criticism which runs through the preliminary audit deserves some comment. The auditors repeatedly suggested that although the allegedly improper procedures in Newark ceased after school year 1971-72 and there was every indication that eligibility determinations for 1972-73 were properly made, there was no documentary evidence that this resulted from SEA action. Pronouncements from OE itself give lie to these assertions. In fact, so strenuous were SEA's efforts at compliance during these years that, by 1973, OE could characterize the newly instituted revision and application procedures as "exemplary." *

As early as April 1971, Sidney P. Marland, Jr., then U.S. Commissioner of Education expressed deep appreciation for the conscientious efforts being made by the State to correct deficiencies in the administration of Title I.** By June 7, 1971, SEA could demonstrate that numerous OE suggestions relative to the personnel, evaluation, and regulatory areas had been implemented.*** The process of administrative reorganization was essentially culminated by 1974. In a letter dated June 14th of that year, Richard L. Fairly, Director of OE's Division of Education for the disadvantaged, could report the following programs in these areas:

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* Appendix B, page 1.

** Appendix C, page 2.

*** Appendix D.

1) Fiscal management—the State had instituted satisfactory procedures, all consistent with federal guidelines, to maintain fiscal control and integrity.

2) Monitoring—the process in New Jersey was recognized as well above average.

3) Target area selection—state guidelines were entirely consistent with federal regulations.*

Thus, during the period of the audit, correspondence with OE indicates that SEA efforts at compliance with federal regulatory mandates were consistently praised and that State administrators were led to believe that they had cured all of the alleged insufficiencies. At the same time, OE staff summoned SEA employees to Washington to extract from them admissions that would later be used in the audit. The unfairness in this is evident.

In sum, given SEA administrative budget for these early years and the overwhelming confusion at all levels of regulation, it is hardly surprising that the State was in no position to monitor the implementation of the program in more than 500 school districts and that there may have been violations of a technical nature. The State was hard-pressed and thus forced to rely heavily on project applications, evaluations and periodic visits. With all this, it still must be stressed that the violations cited were only technical ones. That which was done in Newark was entirely consonant with the intent of the drafters of the Act and the spirit of the legislation itself. There are no allegations that economically and educationally deprived children were not served or that monies were diverted for illegal purposes.

The State believes that it has amply demonstrated that the Newark project as a whole met the requirements of Title I and that any further OE action with respect to the program in school years 1970-71 and 1972-73 is im-

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* Appendix E, pages 3-5.

proper. However, in view of OE's continued insistence that Newark failed to comply with Title I requirements in those years, each audit exception will be considered individually.

I. REFUNDS REQUESTED AS A RESULT OF PAYMENTS TO ALLEGEDLY INELIGIBLE SCHOOLS (1970-71)

As a result of the audit of documents for the 1970-71 school year, OE requests the return of $91,266 in Title I program funds spent by Lafayette Street School and $41,-021 in expenditures by ten other schools.

Initially, the State asserts that OE is barred from recovery of any expenditures made during the 1970-71 school year should they prove to have been unauthorized. 20 U.S.C. 884 provides:

> "No State or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of the Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized."

This five-year statute of limitations was adopted to encourage HEW to make audits more promptly than had been the case and to remove the threat on school administrators of liability for payments received many years before.

By "final written notice" is meant the final determination of an intention to collect, communicated by OE to an SEA after its officials have met with HEW to discuss the preliminary audit exceptions. *Report of the House Education & Labor Committee*, Feb. 21, 1974, 1974 U.S. Code Cong. & Admin. News 4060-61.

Final written notice of OE's intention to collect was not received at the New Jersey Department of Education until June 28, 1976. Records in SEA's possession show

that it received final notification of the grant award on November 5, 1970 and that all Title I monies for programs conducted during the 1970-71 school year, which were the subject of the audit exceptions, were paid to the SEA before June 28, 1971 (five years before final written notice). Therefore, OE cannot collect on any alleged unauthorized uses of those fiscal 1970 and 1971 fund paid before the above-named date.

Although, as argued above, the Newark program met Title I requirement and, in any case, monies paid in school year 1970-71 cannot be recovered since the statute of limitations had run before OE's final written notice was received, the propriety of expenditures for the programs of that year will still be considered individually.

EXPENDITURES BY LAFAYETTE STREET SCHOOL

The auditors request a refund in the amount of $91,266 for payments made to Lafayette Street School because of its allegedly improper classification as eligible. Although the reported AFDC low-income percentage in this school's attendance area (23.5%) fell two points below the district-wide average, it was included on the basis of other factors, all of which were cited in LEA's 1970-71 application and all of which could be considered under existing regulations. Chief among these were the poor economic climate in Newark at the time and a large concentration of Hispanic and other non-English speaking minorities in that section of Newark. The inherent unreliability in the use of AFDC data is even more apparent in such an area as the one served by the Lafayette Street School. Many of its residents were ignorant of how to become welfare clients or evidenced resistance to signing up for welfare.

Furthermore, an OE review of SEA administrative techniques was not effected until March 17, 1971 and the report of that review not received until July 27, 1971, one year after SEA's approval of the Newark application. As had already been demonstrated, the SEA response to

that review was exemplary. It resulted in dramatic adjustments in the review procedures. See Appendix B. Certainly neither the State nor the local agency is without fault in this matter, but since the confusion of the 1970-71 school year, efficient methods of administration have been developed and implemented.

EXPENDITURES AT TEN OTHER SCHOOLS

The auditors also requested the return of some $41,201 as a result of payments made to ten schools made to schools allegedly ineligible to receive Title I funds. The State can only reiterate its former response to the conclusions arrived at by the auditors with respect to these schools—that it has not yet been afforded access to the documentation on which the audit was based. New Jersey Department of Education personnel who prepared the December 10, 1974 response and the two staff members who participated in the meeting with OE officials are no longer employed in the State Title I agency. The Department has been prejudiced by OE's failure to supply information and unable to prepare a meaningful response to the conclusions of the auditors.

The State has no way of knowing what transpired at the November 1975 meeting. Failure of SEA employees to request workpapers at that time is hardly a reason for OE to ignore repeated requests to do so since then. Such refusal is patently unfair and demeans the quality of the hearing to which the State is entitled.

II. EXPENDITURES REQUESTED DUE TO ALLEGEDLY ERRONEOUS IDENTIFICATION OF ATTENDANCE AREAS (1971-72)

The auditors first complain that the stated method of identification of eligible attendance areas deviated from the regulatory mandates of 45 C.F.R. 116.17(d). They further note that the AFDC statistics used by the LEA were incomplete in that they failed to take into account

eligible children in non-public or special education schools as well as those who had dropped out of school.

If anything, this last complaint, as the auditors admit, would tend to result in an underestimation of the number of AFDC children in each district. The effect of course is to make each LEA figure not reflective of the true level of poverty in each district so that there may have been excluded from the program several attendance areas which would have otherwise qualified.

The auditors also admit that the method ultimately used by LEA in 1971—a method of ranking attendance areas on the basis of the percentage of the number of children from low-income families actually enrolled in each school—was a reasonable alternative under the circumstances. Even in retrospect, this method seems not only a reasonable alternative, given the admitted inaccuracies in the AFDC account, but the only reliable alternative open to the local agency.

As section 1.1.1 of *ESEA Title I Program Guide # 44* indicates, the process of ranking by percentages is one that is *normally* used. It further states that all districts need not be ranked on the same basis—eligibility of some population areas may be determined on one basis, eligibility of others on another. This is precisely what was done. LEA employed available free lunch/breakfast, housing, health and unemployment statistics in a weighted formula in a manner consistent with the basic criteria set down by the Commissioner.

Furthermore, the auditors' characterizations of SEA's response of May 7, 1976 as an "ex post facto justification" based on the same errors "which gave rise to the initial audit exception" is both inaccurate and unfair. The calculations in the May 7 submission clearly indicated a correlation between the entire eligible school population in any given attendance area and the number of children from low-income families residing within that area. Although that was made clear in the SEA answer,

it bears reiteration now. To take but one example, the equation given for Madison School is as follows:

$$\frac{937}{1544 + (2389 \times .341)} = 39.7\%$$

The numerator comprises the total number of children from low-income families from Madison's attendance area; the denominator, the total of the elementary school enrollment *plus* the number of junior high and high school students which that attendance are contributed (i.e., 34.1% of those schools' total population of 2389). The auditors' recalculation, on the other hand, employed only AFDC data for elementary school children, measuring the number of elementary school pupils in each school against the total population of that school. In this case, it is the auditors who have ignored the directives of their own program guide by not employing a comparison the corresponding student populations of the attendance area as a whole.

Apart from that consideration, the State must point out that OE is, on one hand, condemning SEA for allowing a local agency to employ an allegedly improper ratio while, on the other, demeaning SEA's recalculation as an "ex post facto calculation" even though it is on the basis of the very type of formula OE calls for. That this recalculation comes after the fact renders it no less valid as a justification. The figures inserted into this revised formula were fully as accurate then as they are now. They serve to demonstrate that even though the formula LEA used may not have conformed exactly to existing federal specifications, the result reached was a just one. It was a result that was calculated to—and did—fulfill the purposes of the federal statute. The goals of Title I, as well as instructions on selection of target areas, were set out in the Title I Program Guide:

> "The purpose of the attendance area requirement is to identify the 'target populations' of children who

> are to be considered for participation in Title I activities on the basis of educational deficiency and the need for special services."

In the final analysis, these ends were furthered by the ultimate distribution of the funds, whatever the target area selection method originally employed. The State believes that the need for Title I funds in these particular areas of Newark, if not in the city as a whole, has been amply justified by the recalculations submitted on May 7 and by the other factors set out in detail throughout this response.

In retrospect, it is easy to criticize the lack of SEA supervision over local programs five years ago. But such criticism does not take into account inherent monitoring limitations and the personnel shortage existent then. Nor does it consider that, by OE's own admission, the monitoring process has significantly improved since.

CONCLUSION

For all of the substantive and procedural reasons just set forth, the State urges that OE's final audit determination on the Newark Title I project be reviewed and that the audit exceptions sustained by OE be overruled.

APPENDIX A

July 26, 1976

Mr. Robert R. Wheeler
Deputy Commissioner
Office of Education
Department of Health, Education
and Welfare
Washington, D.C. 20202

RE: ACN: 50006-02 (Newark Board of Education, Title I Audit)

Dear Mr. Wheeler:

Your letter dated June 11, 1976 containing the Office of Education's final determination concerning the audit of the Newark Title I programs for the period September 1, 1970 to August 31, 1973 was received by the New Jersey State Department of Education on June 28, 1976. It would be appreciated if you could advise us under what authority your office is requesting payment of funds by this Department, since we have been unable to discover any source of such authority ourselves. In the meantime, we wish to preserve our right to a hearing on the final audit determination. On behalf of this Department, I am hereby requesting a hearing pursuant to 45 CFR 16 *et seq.*, which it is my understanding are the federal rules applicable to such a proceeding.

I am aware that these regulations require that this request be accompanied by a statement of the questions which will be the subject of such a hearing, together with "pertinent fact and reasons." As you know, the New Jersey educational system has been operating under extraordinary pressures for the past few months and particularly in the past weeks because of litigation which resulted in our entire system being virtually closed down on July 1, 1976. While the injunction which resulted in this closing has now been dissolved by the New Jersey

Supreme Court, my staff must give priority both to the problems created by that temporary closing and to implementation of the new Jersey Public School Education Act of 1975 which was delayed by the aforementioned litigation. Therefore, it would be appreciated if this agency could be given some time in which to prepare the appropriate documentation to support our request for a hearing. I should note that we continue to be hampered in this matter by our lack of information about the contents of the reports upon which the Newark audit was based, information which we have requested several times.

Sincerely,

FRED G. BURKE
Commissioner

cc: Jane Sommer, Esq.

FGB/gyc/M-8439

APPENDIX B

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF EDUCATION
Washington, D.C. 20202

Jul. 16, 1973

Mr. Jerome Jones
Office of ESEA, Title I
State Department of Education
Trenton, New Jersey 08625

Dear Mr. Jones:

This letter is a follow-up to the New Jersey Title I program review conducted during the week of March 19-23 by William Johnson, Terry Lynch, Edward Smith and Goldia Hodgdon of my staff. The team held extensive discussions with the Title I staff, reviewed selected documents, visited four local school districts, and had a very instructive experience in observing a SEA Title I team visit to one local district. The purpose of the OE team visit, as you know, was to assess the administration and implementation of the New Jersey Title I program with the intent of arriving at an understanding and making recommendations regarding steps to be taken in further strengthening program operations. We were especially interested in the actions that have been taken by the Department following the OE 1972 program review.

We were very pleased to find that the Department's October 6, 1972 response to our review letter of August 8, 1972 was corroborated in almost all instances by the team's findings at the SEA level during the March visit. It is particularly gratifying to be able to point to several critical areas of responsibility and action on the part

of Department personnel which hold promise for exemplary efforts by the State to provide strong leadership for the local school districts. Among those efforts which should be highlighted are: (1) the addition and reorganization of staff, including the provision of staff development opportunities and development of a management system for accomplishing broad objectives and appropriate tasks; (2) the revision of the *SEA Guidelines for Approval of ESEA Title I Program Application* and revision of the application form itself; (3) the development and employment of a comprehensive procedure for on-site visits and follow-up; (4) the formulation and refinement of SEA policy positions on a task force basis, utilizing and coordinating the expertise and experience available from immediate staff, directors of and specialists from other divisions within the Department, selected local Title I coordinators and parents, to a limited extent. While the team's observations during the March visit are generally reflective of the positive steps taken by the SEA since the previous program review, the remainder of this letter will also include observations, findings, and recommendations given for your consideration and action as indicated.

Financial Management, Auditing and Related Matters

Staff additions and reorganization have contributed to furthering the effectiveness of your accounting, disbursement and other fiscal responsibilities. The Department's goal for Fiscal 1973 to perform in-depth audits of 30 Title I programs with emphasis on the districts receiving the largest allocations represents a considerable increase over the nine districts audited during the previous year. The Department's March orientation session on financial auditing procedures for all staff should enhance the efforts of the two accountant auditors in the Division of Administration and Finance who have had to perform an almost impossible job. The 1972 review team's recommendations regarding the addition of at least one audit-

ing position had not been accomplished at the time of the 1973 review visit.

The team was advised during the exit conference that those school districts receiving less than $4,000 allocation were instructed by the SEA to wait until April to submit applications for the use of their Fiscal 1973 funds. Whether this is new or temporary policy, this Office views such instructions as being discriminatory against those districts which want to use their funds but are not allowed to exercise their right to request them at the same time as all other districts. This situation suggests the need for the SEA to examine its staff functions with a view toward providing the necessary technical assistance which would result in the launching of programs during a given school year, rather than leaving the affected LEAs with the options of an abbreviated program for a few months duration or simply carrying over funds for the succeeding school year. Either option does not adequately address the needs of those identified children in need of services during each regular school year.

There are several other options that may be available to the local school districts in question. The SEA could: a) encourage the development of more cooperative projects, given favorable logistical circumstances; b) encourage the use of services of a part-time reading teacher or a tutorial experience for the children; c) provide for the services of a Department helping teacher on a more sustained basis; d) initiate a specially adapted in-service training experience for the regular classroom teachers and one or two para-professionals who have children who have been identified to be in need of supplementary instructional services; or e) provide for a training program for parents to follow through on (at home) instructional techniques they have observed in the classroom.

The recommendations for financial management and auditing concerns are that:

1. The SEA review its widely distributed publication, "Guidelines for Fiscal Management," issued by the Division of Business and Finance, for the purpose of updating if necessary. The latest copy examined by the review team was revised March 1, 1969.

2. The SEA review its policy on the withholding of allocations under $4,000, and inform this Office of rationale and problems attendant to a continuation of this practice; or inform this Office regarding plans for changing this practice, with a full discussion of rationale and problems.

3. The SEA in its expanded technical assistance activities as they relate to auditing, develop a profile of common categories of exceptions and use this in their overall program development activities with LEAs and for development of State policy as indicated.

SEA Policy Development and Parental Involvement

It is our understanding that the involvement of parents in SEA policy issues relative to Title I is limited to parental participation concerns. Even though we are clearly cognizant of the parameters of the Federal requirements regarding parental involvement at the local school district level, it would appear that New Jersey might take a step forward in providing a model for parental involvement for the locals. Such a step would entail a studied consideration of how the State-wide PAC, assuming that it is duly constituted and representative of the local system-wide parent advisory councils, might be more consistently involved in the Department's discussions leading to development of Title I priority and policy issues. In view of what was reported to be a fine working relationship with an unusually active and supportive state-wide PAC, the problems one might anticipate in such an arrangement could be minimized and the spin-off effect, supported by

appropriate and timely dissemination activities, would serve to motivate those local PACs which are experiencing certain growing pains. We are reminded of your recently published *SEA Guidelines for Approval of ESEA Title I Program Application* which are quite explicit on parental involvement requirements, but at the same time our observations in Perth Amboy and a recent visit from a group of Spanish speaking parents from Newark (communicated under separate cover on June 20, 1973) pointed to local problems in carrying out those requirements. We suggest that your own technical assistance efforts for improving parental involvement at the local level could be augmented by what happens at the SEA level and the kind of commitment demonstrated with the State-wide PAC.

The remaining areas of discussion in this letter, with the exception of the section on local site visits, will be undertaken with the acknowledgment that many of the areas of concern discussed at the exit conference in March have been addressed by the Title I staff since that meeting. Our concerns then included aspects of the following areas:

1. application review and approval process;
2. on-site visit and follow-up procedures;
3. staff development process at the LEA level;
4. SEA policy and instructions regarding Title I equipment inventory and disposition of equipment no longer maintained on inventory;
5. observations at the SEA level.

Application Review and Approval Procedure

Your recently published *Guidelines for Approval of ESEA Title I Program Application, Fiscal Year 1974* (subsequent to the March review) is one of the most complete and explicit documents of its kind that we have

seen. That, along with a similarly comprehensive application form and the application review "worksheets" (to be revised no doubt for Fiscal 1974 application) is responsive to the review team's concerns about adequate treatment of support services appropriate for Title I projects; the assessment of needs in determining program priorities; the process by which participants are to be selected; the requirement of measurable performance objectives for project components; the inclusion of the objectives of the previous year's activities in evaluating the project; and the use of the previous year's interim evaluation data for planning the next year's program. Your guidelines on non-public school involvement, preschool and kindergarten programs, and dissemination activities are likewise responsive.

Our recommendations in this area are that:

1. The SEA conduct task oriented workshops for LEA staffs and PAC groups on the new guidelines and application form. We recognize that a first step taken in this direction was the Cherry Hill conference held in May. There you familiarized a limited audience with program requirements and the application form. While we also recognize that Fiscal Year 1974 applications are due shortly, and that it is probable that some revisions will be made for next year (based on the 1973-74 school year experience), we view the two documents as durable and basic information which should be widely disseminated and understood by all who are involved in the Title I program. We anticipate that needs assessment, participant selection, non-public schools, and parental involvement might be some of the more difficult areas requiring special attention.

2. The application review "worksheet" be updated.

3. The evaluators continue their involvement in the review of new applications from the largest dis-

tricts, and hold training sessions for Title I staff to deal with the increased emphasis on performance objectives, needs assessment and evaluation.

On-site Visit and Follow-up Procedures

The SEA has established a comprehensive on-site and follow-up procedure consisting of (1) applying a definite rationale (size of allocation, number of deficiencies noted on the application form, complaints) for determining which LEAs are visited on a priority basis, (2) giving special priority to all LEAs with allocations of $500,000 or more, (3) utilizing report forms for monitoring at the central office LEA level and at the local school level, (4) reporting on SEA visits to LEAs within two weeks of the visit with a request that LEA respond within 15 days. The annual monitoring schedule currently calls for 324 visitations. Helping teachers are responsible for visiting smaller LEAs annually; those LEAs under $50,000 probably will be monitored biennially.

The review team's reading of several SEA monitoring reports revealed thoroughness; and observations of the SEA team on-site in one LEA were positive.

Presently, evaluation personnel participate in monitoring visits to the 14 largest districts and a few others. There is no systematic method for choosing which others the evaluators will visit.

We recommend that the SEA should utilize its rationale sheet for determining priorities in working out a visitation schedule for the evaluators.

The SEA practice of sending expanded teams to the 14 largest school districts for three day monitoring visits insures thorough coverage of central office and project activities. While staff might have sufficient time for the identification of compliance problems and, in most instances, technical assistance activities, the SEA could assure itself of the optimum use of staff time during these

visits by developing a more detailed schedule which provides for identification of problems and the giving of technical assistance.

Staff Development at LEA Level

The new State guidelines are clear and strong on this point. As in all other aspects of program administration and implementation at the local level, the SEA should avail itself of frequent opportunities to participate in and/or observe staff development efforts at the local level.

Title I Equipment Inventory and Disposition

The Title I staff has developed a very instructive section in the new State guidelines on the subject of equipment inventory and disposition of equipment at the local level. At the same time, the SEA should be mindful of the fact that it is responsible for knowing the status of equipment and materials purchases both at the SEA and LEA level. We note that the application form does not require LEAs to report what is on hand. Such data would allow the Title I staff to make more valid decisions about additional requests for equipment and materials purchases.

Local Site Visits by OE Team

There are many factors which often contribute to the variance in program compliance and quality as projected by State guidelines and as effectuated at the local level. By the same token, it is often apparent that State leadership contributes to the implementation of good programs at the local level. In each of the four districts visited by the OE team certain positive features were observed. They include:

1. Elizabeth—efforts to implement a program management system;
2. Camden—the aide/paraprofessional/teacher career ladder concept;

3. Vineland—career ladder concept; program management system; summer school program limited to regular school year participants;

4. Perth Amboy—special institute for Spanish-speaking parents.

With the revised State guidelines and other improved SE Administrative practices already referred to at several points in this letter, we look forward to the resolution of several problem areas observed at local project sites.

Among those problem areas for which corrective action is required are:

1. Elizabeth—a) final resolution of the Instructional and Materials Center problem; b) selection of pre-Kindergarten participants on a "first come first serve basis", rather than those participants demonstrating the greatest need.

2. Camden—a) a realistic realignment of and/or reduction in the Title I administrative staff; b) inadequate needs assessment documentation as it relates to all program components and supportive services; c) confusion on the part of some staff (medical) regarding their roles and function; d) correlation between Winston Camp project and instructional activities; e) program design and scheduling resulting in a high frequency of movement by children back and forth to numerous staff during course of a given day. Some teachers have indicated that they do not have children long enough in order for the Galaxy process to be a meaningful reinforcement technique.

3. Vineland—a) vaguely written objectives not well tied into Project Puppies activities; b) Project Puppies aides and Title I aides at the Max Leuchter School not focusing on problems of the most severely disadvantaged children; speech therapist, nurse, attendance worker not focusing on Title I participants; c) Sacred Heart School (non-public) not involved in planning of mathematics and reading projects currently operating in that school. The principal was also uncertain as to the basis on which participants were selected.

4. Perth Amboy—a) informal, non-systematic approach to selecting of program participants (also a problem in Vineland); b) needs assessment founded on survey of teacher opinions and surveys of opinions of others knowledgeable about education problems in LEA. No objective data used since 1971; LEA staff feels that the 1971 test results have been corroborated by subsequent survey findings.

We would appreciate, within 60 days, a written response to this report with clarification on questions raised and comments on any action taken or planned for implementation of our recommendations.

The review team was encouraged by your action to date and look forward to a continuing relationship that will serve the best interests of the educationally deprived children in New Jersey.

Sincerely yours,

/s/ Richard L. Fairley
RICHARD L. FAIRLEY
Director, Division of
Compensatory Education

[SEAL]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
Box 911, Harrisburg, Pa. 17126

June 16, 1976

Chairman, Title I Audit Hearing Board
Office of the U. S. Commissioner of Education
U. S. Office of Education
Room 4003
Federal Office Building #6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

RE: Audit of ESEA Title I
July 1, 1967 through June 30, 1973
ACN: 50000-03

Dear Sir:

The Pennsylvania Secretary of Education, John C. Pittenger, has been notified in writing by Deputy Commissioner Robert R. Wheeler that a final determination in the above-captioned matter has been made by the U. S. Office of Education.

By this letter the State Education Department Grantee officially requests that the Audit Hearing Board grant a review of this final determination pursuant to their authority under 20 U.S.C. § 241(e) *et seq.* of Title I of the Elementary and Secondary Education Act of 1965.

It is the opinion of the Pennsylvania Department of Education that there are numerous questions of material fact, the resolution of which requires the testimony of the allegedly offending LEA school districts' administrative personnel.

In addition, there are questions of law and administrative procedure which require the clarification that a hearing, argument and briefing of all the issues would provide.

Supplanting

For example, the HEW auditors have alleged supplanting violations. However, HEW regulations governing the administration of Title I programs do not clearly define supplanting nor do they describe in sufficient detail the nature of the supplanting which would require the SEA grantee to refuse to approve the LEA application and deny Title I operation funds to the local school district.

General Aid

Office of Education *Guidelines*: *Special Program for Educationally Deprived Children* (OE-35079, 1965-66) state that in "schools that are severely depressed and overwhelmingly impacted by educationally deprived children from low-income families, . . . some projects will by their very nature tend to benefit all children in a school whether they are educationally deprived or not." Relying on the aforementioned, certain LEA's structured their Title I programs in ways that have made them vulnerable to unsupported OE allegations of general aid. This situation has left the SEA in an untenable position. The SEA imposed the OE *Guidelines* on the LEA's and now must try to defend itself against OE for using these same Guidelines.

Expenditures at Non-target Schools

The SEA's nationwide are still looking to OE for guidance and clarification of OE's *Program Guide #44*, which supposedly sets forth the procedures to be followed when an LEA is under court or agency orders to desegregate. Absent this clarification for the period in question, the SEA approved programs which followed Title I eligible children from target (segregated) schools to non-target (integrated) schools. To allow OE to repudiate *Guidelines* that were in place at the time is inequitable and arbitrary.

Our detailed and specific responses to issues raised in the Preliminary Audit appear to have been given only the most cursory review by OE. We are, therefore, submitting the detailed responses of the Pennsylvania Department of Education to the Hearing Board in the hope that the matters in dispute will be given the fullest possible review by the Audit Hearing Board. A copy of the final audit report is attached to this letter.

Very truly yours,

/s/ Patricia A. Donovan
PATRICIA A. DONOVAN
Deputy Attorney General
Chief Counsel
Pennsylvania Department of Education

Attachments (2) Detailed Response
Final Audit Determination

cc: Robert W. Wheeler
Deputy Commissioner for
School Systems

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No.

Civil Action 80-1991

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, PETITIONER

v.

SHIRLEY HUFSTEDLER, SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, RESPONDENT

PETITION FOR REVIEW

The State of New Jersey, Department of Education, hereby petitions the Court for review of the final decision of the Secretary of Education dated May 7, 1980, in the Appeal of the State of New Jersey, Docket No. 14-(29-76, Audit Control No. 50006-02, ordering the State of New Jersey to refund to the Secretary of Education the amount of $1,031,304.00.

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Petitioner

By /s/ M. Kathleen Duncan
M. KATHLEEN DUNCAN
Deputy Attorney General

Dated: July 3, 1980

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, RESPONDENT

PETITION FOR REVIEW

Pursuant to 20 U.S.C.A. § 2851(a) and Rule 15 of the Federal Rules of Appellate Procedure, the Commonwealth of Pennsylvania hereby petitions this Court for review of the final decision of the Education Appeal Board of the United States Department of Education (formerly the Office of Education, Department of Health, Education, and Welfare), ruling that Pennsylvania should refund $422,424.29 to the Department of Education, notice of which was received on July 21, 1980, by letter dated July 16, 1980.

The respondent is the Secretary of Education, U.S. Department of Education, 400 Maryland Ave., S.W., Washington, D.C., 20202.

/s/ Margaret Hunting
MARGARET HUNTING
Deputy Attorney General

/s/ Emogene Trexel
EMOGENE TREXEL
Assistant Attorney General

HARVEY BARTLE, III
Acting Attorney General

Pennsylvania Department
of Justice
16th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 787-5050

September 16, 1980

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION, RESPONDENT

PROOF OF SERVICE

I, Margaret Hunting, hereby certify that on September 15, 1980, I placed copies of the attached Petition for Review in the above captioned case in the United States Mail, first class, postage prepaid, addressed to the parties who have been admitted to participate in the proceedings before the Education Appeal Board in the Appeal of the State of Pennsylvania, Docket No. 10-(25)-76, Audit Control No. 50000-03, as follows:

Gerald Solomon for Albert Gallatin
99 East Main Street
Uniontown, PA 15401

Martin Horowitz for Philadelphia
Assistant Counsel
School District of Philadelphia
Board of Education
Parkway at 21st Street
Philadelphia, PA 19103

Robert Costello for McKeesport
1106 Lincoln Highway, Suite B
North Versailles, PA 15137

Robert Stefanko for Pittsburgh
Board of Public Education
School District of Pittsburgh
341 S. Bellefield Avenue
Pittsburgh, PA 15213

/s/ Margaret Hunting
MARGARET HUNTING
Deputy Attorney General

Dated: September 15, 1980

TITLE I AUDIT HEARING BOARD
UNITED STATES OFFICE OF EDUCATION
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Appeal of:

Commonwealth of Pennsylvania

Title I, ESEA

Docket No. 10-(25)-76

ACN: 50000-03

Ruling on Pre-Hearing Motions

POSTURE OF THE CASE

This appeal was initiated by letter of June 16, 1976 from the Chief Counsel for the Pennsylvania Department of Education ("Appellant") constituting a timely appeal of audit determinations made by the Deputy Commissioner for School Systems of the U.S. Office of Education ("Respondent") in a final determination letter dated May 18, 1976. A pre-hearing conference was convened on January 18, 1977, and a pre-hearing conference statement was issued on February 17, 1977 granting interventions to various local Education agencies and setting forth a schedule of discovery.

In the months following, the parties have exchanged documentation and interrogatories, and conferenced in an attempt to prepare stipulations of fact and to narrow the focus of this proceeding. On August 25, 1977 the parties filed a "Joint Submission" summarizing their efforts to that date. As part of that "Joint Submission" Counsel for the Appellant requested this Panel's permission to file certain pre-hearing motions. Motions were made, briefed in writing by both parties, and argued orally in Washington, D.C. on December 7, 1977. A transcript of that

argument was prepared and corrected by the parties. The Panel accepts the final corrected transcript filed February 28, 1978 by Appellant's counsel as the record of the oral argument.

The Panel has before it two additional communications, one dated January 9, 1978 from Appellant and one dated January 19, 1978 from Respondent. The intervenor local education agencies did not file briefs on the pre-hearing motions, but several indicated support for Appellant's motions, and the remaining intervenors were silent. The Panel presumes that all intervenors are generally supportive of Appellant's motions and for the reasons given by the Appellant.

PRE-HEARING MOTIONS OF THE COMMONWEALTH OF PENNSYLVANIA

Appellant's pre-hearing motions now before the Panel were previously formulated in writing on September 15, 1977, orally on December 7, 1977, and in Appellant's letter of January 9, 1978. This last communication asked the Panel to rule "on the motions and issues raised in our Brief and oral argument". While a number of issues were raised in the Briefs and at oral argument, the Panel considers the following to be ripe for decision at this juncture, and rules thereon as follows.

Motion to Dismiss for Lack of Jurisdiction to Conduct a "Refund" Proceeding

Appellant seeks dismissal of this proceeding on the grounds that neither the Commissioner of Education nor the Audit Hearing and Panel convened to hear this case, has authority to seek a refund of monies expended by the State and local education agencies under a Title I grant from the U.S. Office of Education.

In support of this motion, Appellant cites the lack of a specific provision in Title I authorizing the Commissioner to recover improperly spent Title I monies, and

asserts that the Commissioner's remedies under Title I are limited to a prospective withholding of funds (under 20 U.S.C. 241j or 1232c) and disapproval of applications (under 20 U.S.C. 241f).

Respondent, on the other hand, finds authority for refund proceedings in 20 U.S.C. 1232d which authorizes the Commissioner to make "adjustments on account of overpayments or underpayments, as the Commissioner may determine". Respondent also notes a prior decision on this point, *Texas Migrant Program Appeal*, Docket No. 7-(9)-74, and the fact that previous Hearing Board Panels have found refunds owing in substantial amounts, *Florida*, Docket No. 1-(12)-75 and *California*, Docket No. 3-(14)-75. Finally, Respondent cites 20 U.S.C. 884 which imposes a five year statute of limitations on State or local liability to refund unauthorized Title I expenditures.

The Panel is persuaded that the Commissioner has ample authority to seek refund of monies improperly spent under Title I (among other) grants. Appellant's construction of the statute leads to a most illogical result: the Commissioner must either deny Title I grant funds before any money actually flows to a State, or detect the State's failure to carry out grant assurances in the course of the grant, leaving the Commissioner no recourse to recoup misspent funds upon conclusion of each grant cycle. The Panel finds no evidence that Congress so intended to limit the Commissioner's authority to enforce the proper expenditure of Federal funds, particularly in light of the statute of limitations cited above. If the Congress did not intend the Commissioner to have authority to recover monies one, two, three or four years after termination of a grant, the five year statute of limitation would be rendered a nullity. The Commissioner is not, therefore, in the opinion of the Panel, limited to prospective withholding or offset and may recover funds improperly spent.

Appellant also questions the authority of this Panel to order a refund. This Panel takes a limited view of the jurisdiction granted to it under the terms of the Federal Register Notice establishing a Title I Audit Hearing Board (37 FR 23002 amended by 41 FR 28568). The Commissioner established the Board for the purposes of providing State agencies an administrative forum for the review of final audit determinations made in the normal course of Title I administration. The Board has jurisdiction to review and, where necessary, hold hearings upon final audit determinations only where application for such a review is made by the grantee state agency. When the Board accepts an Appeal, the Office of Education takes no action to collect the audit exceptions until *the Commissioner* has made a final decision on the appeal. The role of the Board (through individual hearing panels) is limited to reviewing the facts, making findings and submitting an *initial* decision to the Commissioner. These decisions only become final when accepted by the Commissioner and made final by him either as submitted or modified by him. Only then does the Office of Education, and not the Board, take action to enforce a decision through refund or otherwise. As such, the Panel finds that it's own authority and jurisdiction do not extend to the question of *how* the Commissioner should go about enforcing his decision (a choice of remedies question), but rather only to advise the Commissioner as to whether the audit exceptions were properly taken.[1]

For all of the above reasons, the Panel denies Appellant's petition to dismiss this proceeding for lack of jurisdiction.

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[1] Appellant may, of course, defeat the jurisdiction of this Panel by withdrawing its appeal. The effect of withdrawal is, in the opinion of the Panel, to reactivate the final audit determination made by the Deputy Commissioner, and to accelerate a process in which the Commissioner will choose how to enforce that audit finding.

Challenge to the Board's Procedures and the Nature of Audit Hearings

Appellant sets forth a variety of challenges to the Board's procedures as embodied both in the Federal Register Notice establishing the Board and in the General Provisions dated March 1, 1976. Appellant has moved on a variety of procedural questions asking this Panel to afford it procedural rights not generally afforded to grantee appellants under either the Federal Register Notice or the General Provisions. As underpinning for most of these requests, Appellant asserts the applicability of the Administrative Procedures Act ("APA") to Board proceedings.

While the Panel wishes to address each of Appellant's major assertions, and does so in summary form below, the Panel is compelled to deny Appellant's procedural motions and does so herein. The Audit Hearing Board was established by the Commissioner of Education, and its members serve by appointment of the Commissioner. In accepting that appointment, individual Board members, including those serving on this Panel, accept the procedures set forth both in the Federal Register Notice and the General Provisions. As such, and if the Panel were sympathetic to Appellant's assertions, it would be without authority to reject our own procedures and impose substitutes for them. However, we need not reach the question of our own authority since this Panel finds the procedures challenged are reasonable ones.

1. *Applicability of the Administrative Procedures Act*

Appellant contends that a full evidentiary hearing in consonance with the provisions of the APA is required in this case. Appellant reaches this result by characterizing this proceeding a statutory adjudication. The Panel rejects this contention. The audit appeal process is not a de novo adjudication of statutory rights. It is rather a forum offered to grantees, and voluntarily accepted, for

reviewing the accuracy of audit exceptions given in the normal administration of a Federal grant program.

Nor is the Federal Register Notice establishing the Board or the promulgation of the General Provisions a "rule making" subject to the notice and comment requirement of the APA. Finally, since Appellant had actual notice of the General Provisions at the time it filed its application for review, the Panel can find no prejudice to Appellant by any failure to publish the General Provisions in the Federal Register.

The Federal Register Notice is clear in providing for a hearing process at variance with APA adjudications. The Panel is required to afford an opportunity for a hearing only with respect to cases involving a dispute of a material fact where resolution would be materially assisted by oral testimony; and where a hearing is provided, the Panel need only assure each party the limited procedural rights set forth in Section 7, subparagraphs (b) (2) (i), (ii), and (iii) of the Notice.

2. *Presentation of evidence and burden of proof*

Appellant would ask the Panel to place the burden of going forward and the burden of proof upon Respondent. Again, this is clearly at odds with the General Provisions of which Appellant had notice at the time it filed its appeal, and by which this Panel is bound.

Paragraph 12 of the General Provisions places the burden of proof and the initial burden of going forward with presentation of its direct case upon the grantee appellant. The Panel considers this to be a reasonable requirement since we must presume that final audit determination letters of the Deputy Commissioner represent something more than unsupported claims for refund. While the final audit determination letter may be the beginning of the Board's process, it is the conclusion of a rather lengthy audit process during the course of which Federal auditors make initial findings and State and local agencies

are afforded an opportunity to contest those findings. Issues raised and information submitted to the grantee are reviewed by the Deputy Commissioner before a final determination letter is issued. A good portion of that prior activity is reflected in the initial hearing record now before the Panel.

As a recipient of Title I funds, Appellant had an obligation to use those funds in accordance with assurances given when the funds were applied for and with provisions of the statute and regulations governing the grant when awarded. Federal auditors have found, after Appellant was afforded an opportunity to respond to initial audit findings, that the Commonwealth did not fully comply with relevant assurances and obligations. Only then is a final determination letter issued, and at that point Appellant becomes the moving party when it seeks a review of that final determination letter.

3. *Motions to compel discovery*

Appellant has also moved for orders compelling answers to interrogatories, production of documents, and the making available of certain witnesses for depositions. Again, the Board's General Provisions are clearly to the contrary. Paragraph 18 plainly establishes that the Federal Rules of Civil Procedure do not apply:

> "The panel does not have authority to issue subpoenas or order the production of evidence or discovery of witnesses by deposition or otherwise".

However, the Panel notes that the same Paragraph 18 goes on to provide:

> "However, the Office of Education will cooperate to the extent it has control over its own personnel or can arrange for such production or discovery from other divisions of the department or other agencies of the Federal Government".

The Panel interprets this language to be a good faith commitment on the part of the Office of Education to make reasonable responses to interrogatories and requests for production of documents, and to make reasonable efforts to identify appropriate audit personnel and make those personnel available for deposition by a grantee appellant. For these reasons, the Panel denies the motions for various orders, but urges Counsel for the Respondent to cooperate to the fullest extent practical in meeting the requests of opposing Counsel in fulfillment of that commitment.

Recovery Barred by the Statute of Limitations

The parties have agreed to the application of the statute of limitations, and we confirm our ruling of December 7, 1977 at which time we granted, without objection, Appellant's motion to dismiss $618,389.44 of the amount claimed in the final audit determination letter and find that amount barred by the statute. This leaves in dispute in this proceeding only $677,194.56 of the $1,295,584.00 originally claimed.

APPELLANT'S RIGHT TO A HEARING

Although not briefed or argued orally on December 7, 1977, an additional issue has been raised in subsequent communications. In its communication of January 9, 1978, Appellant asserts that if the Panel finds jurisdiction over this controversy, "it must order a full evidentiary hearing". Respondent suggests in its February 19, 1978 communication that the request for hearing may still be premature, alleging that Appellant has not identified the particular material facts at issue. Respondent cites Sections 5(a)(2) and 7(b)(2) of the Federal Register Notice. Respondent goes on to assert that it would be "inappropriate" for the Panel to order an evidentiary hearing until Appellant "clearly identifies what material facts are at issue".

The Panel concludes, after reviewing the voluminous materials already exchanged between the parties, that

Respondent's reading of the Board's Notice is too literal under the circumstances. The Panel finds that Appellant has raised a number of issues in the discovery stage and at the oral argument of December 7, which would justify the scheduling of a hearing in this case. The Panel would also call Respondent's attention to Page 2 of the "Joint Submission" of Counsel dated August 5, 1977, submitted to the Board under cover of August 25, 1977:

> "Counsel agreed that due to the extent of the factual disputes and complexity of the legal issues it is impossible to briefly summarize the issues involved."

It would not be fruitful to delay the scheduling of a hearing for the purpose of requiring Appellant to specify in writing those particular facts which it now considers to be in dispute.

Appellant is entitled to a hearing if it continues to desire one. Therefore, the Panel orders Counsel for Appellant to report back to the Panel within forty-five (45) days hereof with either:

1. A motion to withdraw its appeal;
2. A request to have the case decided upon the written record; or
3. A proposed schedule for hearing, arrived at after consultation with Respondent and the intervenors.

In the event Appellant chooses to go forward to a hearing, the Panel would expect both parties to advise us in advance of the hearing itself of the witnesses which each side proposes to call, and the general areas of controversy on which their direct case will focus. Obviously, the resolution of the matter can be facilitated if the parties can agree to stipulations of fact in advance of the hearing. We stop short of requiring them to do so only be-

cause of the time already consumed in unsuccessful discussions directed toward that end.

CHARLES E. HANSEN
OLCOTT D. SMITH
ROBERT J. SANER II, Chairman

/s/ Robert J. Saner II

May 9, 1978

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY
Washington, D.C. 20201

March 31, 1978

Office of the
General Counsel

Dr. David S. Pollen, Chairman
Title I Audit Hearing Board
U.S. Office of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Title I Audit Appeal of New Jersey
Docket No. 14-(29)-76
Audit Control No. 50006-02

Dear Dr. Pollen:

Enclosed is a joint "Pre-hearing Memorandum", together with the SEA's statement of factual and legal contentions and the Deputy Commissioner's statement of the issues presented and his position.

This letter clarifies that neither party requests a formal evidentiary hearing, at this time. We believe that all evidence on factual issues can be presented through briefs, documentary evidence and affidavits. However, both parties reserve the right to cross-examine affiants if their statements raise contested issues of fact.

This letter further clarifies that the parties jointly propose the following schedule:

(1) Within 45 days after the Panel issues its order regarding further proceedings the SEA shall file

its brief together with all supporting documentary evidence and affidavits.

(2) Within 45 days after receipt of the SEA's brief the Deputy Commissioner shall file its brief together with all supporting documentary evidence and affidavits.

(3) Within 20 days after receipt of the Deputy Commissioner's brief the SEA may file a reply brief.

The New Jersey SEA requests (and we do not oppose this request) that the Panel schedule oral argument at a convenient time following the exchange of briefs.

Mr. Mark Schorr, counsel for the SEA has been informed of and concurs with the clarifications in this letter.

Sincerely,

/s/ Robert J. Arnot
ROBERT J. ARNOT

/s/ Philip H. Rosenfelt
PHILIP H. ROSENFELT
Attorneys for the Deputy Commissioner
for the Bureau of Elementary and
Secondary Education

cc: Mr. Mark Schorr, Esq.

BEFORE TITLE I AUDIT HEARING BOARD
U.S. OFFICE OF EDUCATION
DEPARTMENT OF HEALTH, EDUCATION
& WELFARE

Docket No. 14-(29)-76

APPEAL OF STATE OF NEW JERSEY
TITLE I, ESEA

PRE-HEARING MEMORANDUM

1. HEARING:

Neither party at this time requests a formal evidentiary hearing. In the event that no factual issues arise, the hearing in this matter will be confined to oral argument on the admissibility of documents and the legal issues raised.

In place of a formal evidentiary hearing, SEA will submit an affidavit from one of those who participated in the recalculations which it asserts now show eligibility of the schools declared ineligible by the audit. Counsel for the Deputy Commissioner will be provided with a copy of the affidavit in advance of the date set for argument and reserves the right to cross-examine the affiant if his statement raises contested issues of fact.

The Deputy Commissioner reserves the right to submit an affidavit of an auditor involved in this matter. Counsel for SEA will be provided with a copy of the affidavit in advance of the date set for hearing and reserves the right to cross-examine the affiant if his statement raises contested issues of fact.

2. EXHIBITS:

All other evidence to be offered at the hearing will be documentary in form. The respective parties will confer prior to hearing in order to mark in evidence by consent as many exhibits as possible. Exhibits offered by each party will be appended to its brief.

3. BRIEFS:

SEA's brief will be filed 45 days after the Panel issues its order regarding the hearing in this matter. The Deputy Commissioner's brief will be filed 45 days after receipt of SEA's brief. A reply brief, if one is deemed necessary, will be filed by SEA 20 days after receipt of the Deputy Commissioner's brief. All briefs will be served by certified mail, return receipt requested.

4. OTHER MATTERS AGREED UPON:

The parties have reached a tentative settlement regarding OE's claims for school year 1970-71. When a firm agreement is reached, a stipulation of settlement will be provided to the Panel for its approval.

5. FACTUAL AND LEGAL CONTENTIONS OF THE PARTIES:

See attached memoranda.

/s/ Robert J. ARNOT
Attorney for the
Deputy Commssioner

/s/ Philip H. Rosenfelt
Attorney for the
Deputy Commissioner *
JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for New Jersey Department of Education

By: /s/ Mark Schorr
MARK SCHORR
Deputy Attorney General

* See our attached letter of March 31, 1978 for clarification.

Statement of the Issues Presented and the Deputy Commissioner's Position

1. Whether $91,266 in Title I funds were improperly expended at the Lafayette Street School (which was shown on the Newark LEA's 1970-71 Title I project application as having a low-income percentage below the district-wide average) during the 1970-71 project year?

It is the Deputy Commissioner's position that the Lafayette Street School was, as shown in Newark's 1970-71 project application, an ineligible attendance area and that $91,266 in Title I funds were improperly expended at the Lafayette Street School during the 1970-71 project year. The amount of funds which are recoverable has been substantially reduced by the statute of limitations and the parties have reached a tentative settlement of the Lafayette Street School audit determination.

2. Whether $41,021 in Title I funds were improperly expended at ten Newark schools (which were not listed on the Newark LEAs 1970-71 Title I project application as having low-income percentages below the district-wide average) during the 1970-71 project year?

It is the Deputy Commissioner's position that $41,021 in Title I funds were improperly expended at ten Newark schools during the 1970-71 project year. These ten schools were not listed on the Newark LEA's 1970-71 Title I project application as having low-income percentages below the district-wide average. The amount of funds that are recoverable has been substantially reduced by the statute of limitations and the parties have reached a tentative settlement of the audit determination concerning these ten Newark schools for 1970-71.

3. Whether the Newark LEA's method of computing the low-income percentages, listed in Newark's 1971-72 Title I project application, for school attendance areas complied with the Title I statute and regulations?

It is the Deputy Commissioner's position that Newark's method of computing the low-income percentages clearly violated Title I requirements, in particular the method set forth in 45 CFR 116.17(d) for determining the eligibility of attendance areas. The method used by Newark had basic mathematical flaws which inflated the low-income percentages for individual school attendance areas and thus improperly increased the number of eligible attendance areas.

4. Whether $1,029,630 in Title I funds were improperly expended during the 1971-72 project year at 13 Newark schools which the Newark LEA had incorrectly classified as eligible to receive Title I funds?

It is the position of the Deputy Commissioner that $1,029,630 in Title I funds were improperly expended at 13 ineligible schools during the 1971-72 project year.

5. Whether the recalculation of low-income percentages contained in Mr. Joseph Moore's May 7, 1976 letter to Dr. Richard Fairley (or any other after-the-fact eligibility recalculation) is relevant to this appeal?

It is the Deputy Commissioner's position that the New Jersey SEA, in approving the Newark LEA's 1971-72 Title I project application, violated its assurance to the U.S. Commissioner of Education that it would approve only applications which were in compliance with the Title I statute and regulations. The Newark LEA's 1971-72 application contained computations of eligibility that violated basic Title I requirements. Subsequent eligibility recalculations are not relevant.

6. Assuming *arguendo* that the May 7, 1976 recalculation (or any other after-the-fact eligibilty recalculation) is relevant, does such recalculation comply with the Title I statute and regulation?

As stated in the Deputy Commissioner's June 11, 1976 Final Determination Letter, the May 7, 1976 recalcula-

tion violates Title I requirements and (like the method used in computing the percentages in the 1971-72 project application) improperly inflates the low-income percentages for individual school attendance areas and thus improperly increases the number of eligible attendance areas.

/s/ Philip H. Rosenfelt
PHILIP H. ROSENFELT

/s/ Robert J. Arnot
ROBERT J. ARNOT

Attorneys for the Deputy Commissioner
for the Bureau of Elementary and
Secondary Education

March 31, 1978

SEA'S FACTUAL AND LEGAL CONTENTIONS

1. HEW is without authority to recover Title I monies already expended at the local level. Its sole remedy is prospective and is prescribed by statute witholding of future funds.

2. For the years in question in the instant action, the Newark program in general met the requirements of Title I. In approving the district's applications, SEA properly considered AFDC data and further recognized indices of poverty. The failure of the auditors and the Deputy Commissioner to recognize such reliance militates toward the conclusion that their findings were unjustified.

3. The propriety of SEA's action was also demonstrated, if not by the Newark application, then by recalculations done subsequent to the audit. They showed that the expenditure in schools alleged to be ineligible were in fact proper and in conformance with the applicable Title I regulations. If such recalculations are not considered; the result would be unduly punitive, and those penalized would be precisely the individuals Title I of the Elementary and Secondary Education Act was designed to benefit—disadvantaged children.

4. In the alternative, under any view of the applicable regulations, the whole of the school district could have been considered a Title I project area.

BEFORE TITLE I AUDIT HEARING BOARD
U.S. OFFICE OF EDUCATION
DEPARTMENT OF HEALTH, EDUCATION
& WELFARE

Docket No. 14-(29)-76

APPEAL OF STATE OF NEW JERSEY
TITLE I, ESEA

AFFIDAVIT OF BERNARD J. BRANDWENE

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for New Jersey Department
of Education
State House Annex
Trenton, New Jersey 08625

MARK SCHORR
Deputy Attorney General
Of Counsel and
On the Brief

STATE OF NEW JERSEY)
) ss.
COUNTY OF MERCER)

I, BERNARD J. BRANDWENE, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am currently in the employ of the New Jersey Department of Education. My title is Accountant I. Among my current responsibilities is fiscal program management of ESEA Title I to sub-grantees.

2. I am submitting this affidavit in connection with the appeal of the State of New Jersey, Department of Education, the above-captioned matter.

3. In November 1975, a meeting was held in the office of Mr. Frank Esposito, Federal Programs Director for Newark. I was among those who attended. The others were Frank Esposito, Rudy Jacob, Bob Darden, Sanford Gottlieb and Mel Marech, all of whom were employed in the Newark Federal Programs Office. Also in attendance were Jerome Jones, Ira Helfgott, Bill Franssen, and John Calcerano, all of whom were, as was I, in the employ of the New Jersey State Department of Education.

4. The aforementioned meeting was held to review the material and data involved in an audit exception of $1,029,630 contained in the Report of Audit of Title I of the Elementary and Secondary Education Act of 1965, Audit Control No. 50006-02, which related to the selection of target areas for Newark, New Jersey for the period September 1, 1970 to August 31, 1973. Discussion was limited to Recommendation No. 1 on page 18 of the Report, which was to the effect that $1,167,917 should be returned to the United States Office of Education. It was alleged in the report that that sum was expanded on ineligible attendance areas for school years 1970-71 and 1971-72.

5. As a result of these discussions it was agreed that the source data utilized for total low-income children for

individual attendance areas were incomplete and did not reflect accurately the number of low-income children concentrated in the areas.

6. Although school attendance areas were defined, we determined that the Newark Board of Education's long-standing policy of open enrollment (which meant that some children in a particular area might be attending other schools throughout the city) indicated that a different method of calculating eligibility should have been used. In our estimation, the proper method was one described in Title I ESEA Program Guide #44, furnished to us by the Office of Education, Department of Health, Education and Welfare. Criterion 1.1 of that document, we believed, authorized us to use a system of ranking, and a ratio which considered all school children who resided in a particular attendance area and were enrolled in elementary, junior and senior high schools. A true copy of the relevant excerpts from Program Guide #44 are attached hereto as Exhibit A.

7. AFDC data were utilized in the ratio. The numerator was comprised of the total number of AFDC children from any attendance area enrolled in elementary, junior and senior high schools; the denominator was made up of the total number of children from the area enrolled in elementary, junior and senior high schools. The formula was set up as follows:

$$\frac{\text{"Total number AFDC children in elementary, junior and senior high schools}}{\text{Total students enrolled in elementary, junior and senior high schools."}} = \text{Ratio}$$

8. The actual calculations are shown in Exhibit B, attached hereto. Columns 1, 2, 3 and 5 of Exhibit B are the same figures relied upon by the auditors on page 12 of their aforementioned report. Column 6 is the formula used to determine the number of students from a particular school enrolled in junior and senior high schools. The product of the two numbers in column 6 yielded the

number of students from a particular attendance area in junior and senior high schools. To make an example, according to Newark's statistics, 34.1 percent of the total junior and senior high school populations of schools fed by the Madison School (2389) come from the Madison school's attendance area. The product of those two figures thus demonstrates the number of students from the Madison attendance area enrolled in junior and senior high schools, or 815 (column 7). Adding that total to the total elementary enrollment column's yielded the number of students of all elementary and secondary grades from the Madison attendance area. The number represents the numerator in the above formula.

9. I have also provided data which demonstrates the extraordinary effort exerted by the taxpayers of Newark on account of Newark's meager tax base. Newark is at present, as it was in school year 1971-72, among the most overburdened municipalities in New Jersey. These data are attached hereto as Exhibit C.

/s/ Bernard J. Brandwene
BERNARD J. BRANDWENE

Sworn and subscribed to
before me this 30th day
of May, 1978.

EXHIBIT S-V

BOARD OF EDUCATION
OFFICE OF THE SUPERINTENDENT
NEWARK, NEW JERSEY

FEDERAL ASSISTANCE PROGRAMS
P.L. 89-10 ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

TITLE I
APPLICATION FOR
FISCAL YEAR 1971-1972

FRANKLYN TITUS
SUPERINTENDENT OF SCHOOLS

SELECTION OF ATTENDANCE AREAS FOR TITLE I PROJECTS

The attendance areas selected for Title I projects are those areas which, on the basis of the best available information have high concentrations of children from low-income families.

Eligible schools have been listed in order of highest concentration. The criterion used in qualifying schools was based on statistics on Aid for Dependent Children supplied by the Essex County Welfare Board.

Before selecting this method for qualifying attendance areas and schools within those attendance areas the following data were also examined:

- Housing statistics supplied by Applied Urbanetics
- Model Cities Statistics (Entire City of Newark is now a Model Neighborhood)
- Free lunch and free breakfast statistics (32,865 served daily)
- High percentage of Puerto Rican children
- High incident of foreign born and non-English speaking children
- Health Statistics
- Unemployment and Underemployed statistics

It should be noted that in comparing the statistics and projections compiled by Applied Urbanetics and the A.D.C. statistics provided by the Essex County Welfare Board, that each complements (possibly validates) the other.

	Applied Urbanetics	ADC Statistics
Children from low-income families 5-17	33,011	32,352
District Wide Percentage	32.6%	33.9%

The district-wide percentage was determined to be 33.9% of children 5-17 from low-income families. Located in eligible attendance areas are forty-two (42) public elementary schools, fourteen (14) non-public elementary schools, five (5) public junior high schools, six (6) public senior high schools and twelve (12) special education schools. Cleveland Elementary school will not participate in the E.S.E.A. Title I Program because it is endowed by the Chubb Foundation and the project is known as the "Victoria Plan". West Kinney Junior High school will not participate in the E.S.E.A. Title I Program because it receives supplementary funds from the Newark Board of Education and is known as the "Newark Plan".

Thirteenth Avenue school is a new school which will open in September, 1971 and draw its pupils from the Fourteenth Avenue, Fifteenth Avenue, Newton Street and South 8th Street School attendance areas. The percentage of children from low-income families is the average of the percentages of the four eligible attendance areas.

Based on an initial allocation of $7,202,529, it was determined that 23,900 children would participate in the program and receive at least $300 in Title I services and resources as mandated by state guidelines.

The average percentage of 35.7% was applied to the enrollment of each of the eligible public elementary, non-public elementary and special education schools in order to allocate on an equitable basis the number of Title I participating children in each of these schools.

The selected eligible secondary schools show the average percentage of low-income of all of the eligible elementary schools which feed into each of the secondary schools. The selected eligible secondary schools were assigned participating children on the basis of those children previously identified and who received Title I services in these schools in FY 1969, FY 1970, and follow-up services for new entrants who had been identified as Title I par-

ticipants in the feeding public elementary, non-public elementary and special education schools in FY 1970-1971.

Special Education schools are classified by handicap and therefore draw children from all attendance areas in the city. Participating children were allocated at the same percentage as other schools—35.7% of the enrollment.

Finally, the 23,900 participating children were distributed in the selected schools in eligible attendance areas as follows:

41	Public Elementary	16,639
6	Public Senior High	3,433
4	Public Junior High	1,407
14	Non-public Elementary	1,572
12	Public Special Education	849
	TOTAL	23,900

14. List objective data in priority order that was used to validate the identified needs of the educationally deprived children in eligible attendance areas (include both public and non-public school children who reside in the area).

A. THE BASIS

In attempting to determine the basis for priorities, each Title I school developed an on-going process of total involvement. Operating under the leadership of the Project Coordinator and with the approval of the principal, each Local Parent Council, project remedial/developmental teachers, student representatives at the secondary level, and a cross section of the school community defined pupil needs and established priority levels.

Based on the data and information gathered by this assessment group priorities were developed. The emphasis was placed on obtaining optimum academic achievement by each of the participating pupils. This needs assessment procedure carried on in each of the participating schools was directed towards a maximum

involvement of parents of the students for whom the Title I resources are intended.

There has been continuous liaison between the Administrator of the Title I Program and the Office of the Superintendent of Schools, of the Archdiocese of Newark. The Assistant Superintendent of Schools of the Archdiocese is a permanent member of the Central Parent Council.

The same criteria and the same involvement of staff and parents were used in assessing the educational needs of children in the non-public schools as were used in the public schools. Therefore, the needs assessment conducted for the elementary public schools applies to the non-public elementary schools.

Prior to any final decision on priorities, the local schools examined the results of the city-wide testing program administered in October, 1970. Newark's Director of Reference and Research released the following information:

"City-wide test results indicate that most Newark pupils are below the national norm in reading and in arithmetic. An examination of school medians and score ranges at the third, sixth, and seventh grade levels indicates that below-norm scores are generally distributed and are not necessarily confined to any one area of the city.

GRADE 3 ANALYSIS OF TEST RESULTS

Approximately 6,100 pupils were tested in Grade 3. Results of the *Reading Comprehension* (*Sentence and Paragraph*) section of the Metropolitan Reading Test show:

In Grade 3, out of every 100 pupils

18 were at, or above the norm in Reading

82 were below norm.

Of the 82 below norm,

32 were less than 1 year below.

50 were 1 year or more below.

In the 51 elementary schools tests, the Reading Comprehension medians (middle score) indicated

2 schools were at, or above norm.

32 schools were less than 1 year below the norm.

17 schools were 1 year or more below the norm.

The age medians on a city-wide basis were:

7 years 10 months—Mental Age

89—Median IQ

In the 44 elementary schools tested in Grade 6, the Reading Comprehension medians (middle score) indicated

No schools had a median at or above the norm.

2 schools had a median less than 1 year below norm.

42 schools had a median 1 year or more below the norm.

An analysis on a city-wide basis of Chronological Age and Kuhlman-Anderson test results shows for Grade 6

11 years 7 months—Median Chronological Age

10 years 4 months—Median Mental Age

89—Median IQ

GRADE 6 ANALYSIS OF TEST RESULTS

Approximately 5,400 pupils were tested in Grade 6. Results on the *Reading Comprehension* (*Paragraph*

Meaning) section of the Metropolitan Reading Test show:

In Grade 6, of every 100 pupils

8 were at, or above norm.

92 were below the norm

of the 92 below norm,

10 were less than 1 year below.

82 were 1 year or more below.

In 44 elementary schools tested in Grade 6, the Reading Comprehension medians (middle score) indicated

No schools had a median at or above the norm.

2 schools had a median less than 1 year below the norm.

42 schools had a median 1 year or more below the norm.

11 years 7 months—Median Chronological Age

10 years 4 months—Median Mental Age

89—Median IQ

The educational criteria for eligibility for participation in Newark's Title I project are as follows:

a) Poor academic achievement

b) Lack of response to conventional classrom approaches

c) Inadequate performance in communicative skills

d) Socially unacceptable behavior

e) Indifference to responsibility

f) Deficiency in cultural background

g) Physical defects and poor health habits

h) Poor school attendance

The instruments used for determining eligibility for participation were as follows:

a) Test scores (city-wide testing program)

b) Title I standardized reading achievement tests

c) School surveys

d) Guidance records

e) School cumulative record cards

f) Title I cumulative record cards

g) Reading profiles

h) Reading inventories

i) Anecdotal records

j) Health records

k) Dental survey

The existing data on the extent and nature of the health, nutrition and learning problems of the children in the attendance area indicates the following:

In the entire country Newark is second only to Washington, D.C. in the percentage of black population (54.2%). Another 11% of the population is comprised of people from an Hispanic background. Over 11% of the labor force are presently unemployed. 35,000 people are employed either full time or part time at a rate of $3,000 per annum.

Over 30% of Newark's population is receiving some form of public assistance.

Almost 80% of the dwelling units in Newark are at least 40 years old. 30% of the city's housing supply, or about 41,000 units, are clearly substantard.

Newark leads nationally with the highest percentage of slum housing, the highest incidence of crime per 100,000 population, the highest population turnover, the second highest population density, a high rate of maternal mortality, the second highest birth rate, a high rate of veneral disease and the seventh highest confirmed number of narcotic addicts. At present the city faces imminent bankruptcy.

All of these factors contribute to a deleterious effect on the nature of the health, nutrition and learning problems of school children. The already overburdened school system, municipal and state agencies supplying only the most fragmented health services, are overwhelmed with the problem of providing the necessary quantity and quality of services to ameliorate the situation.

SUPREME COURT OF THE UNITED STATES

No. 81-2125

TERREL H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

NEW JERSEY AND PENNSYLVANIA

ORDER ALLOWING CERTIORARI

Filed October 4, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

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NO. 81-2125

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,
Respondent.

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION

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T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

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STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION

The Respondent, State of New Jersey, Department of Education, respectfully requests that this Court deny the Petition for Writ of *Certiorari* seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 662 F.2d 208.

Statement of the Case

This case involves separate federal audits of educational programs implemented in New Jersey and Pennsylvania with moneys appropriated under Title I of the Elementary and Secondary Education Act of 1965.*

The purpose of the Title I program is "to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs." 20 U.S.C. § 2701 (1976). Pursuant to its provisions, therefore, substantial amounts of federal aid are directed to local school districts experiencing difficulties in funding adequate programs due to concentrations of low-income families. H. R. Rep. No. 95-1137, 95th Cong. 2d Sess. (May 11, 1978). The basic responsibility for designing and implementing a Title I program is committed to the "local educational agency" which, most typically, is a public board of education. 20 U.S.C. § 244(6)(B). The local agency develops an educational program to meet the unique needs of the educationally deprived children within its attendance area and submits the proposal to the State educational agency for approval. If acceptable, the State agency will approve the Title I proposal and submit it to the United States Department of Education which has the ultimate responsibility for administering the Title I program and dispensing the funds appropriated and allocated thereunder.

Comporting with this administrative structure, the Board of Education of the City of Newark, the local educational agency involved in the New Jersey case, submitted a Title I proposal to the New Jersey Department of Education

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* The facts set forth herein relate solely to the New Jersey Title I program.

for each fiscal year which was included in the present federal audit. These proposals were approved by the State agency and were similarly found acceptable by the appropriate federal officials. The Newark Title I application for the 1971-72 fiscal year, which was the primary focus of the federal audit, showed that 33.9% of the children in the Newark school district were from low-income families (PNJa290).* The statistics further demonstrated that in some areas of the City the incidence of children from low-income families was as high as 80%. The Newark application showed that 53 of the 67 schools in the City had low-income percentages higher than the district-wide average of 33.9% while only 6 schools had less than 20% low-income students (PNJa366 to PNJa367). The narrative portion of the 1971-72 application also demonstrated that Newark was uniformly disadvantaged in other ways. The City was then, as it still is today, in a more advanced state of urban decay than any other in the country. Statistics showed a jobless rate in 1970 of 14%, a rate double that needed to qualify, at that time, under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city (PNJa298). At the time the 1971-1972 proposal was submitted, Newark had a black population of 54.2% with another 11% of its population of Hispanic background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics of Newark's low income population, was the fact that

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* PNJa—refers to the Appendix submitted on behalf of the Petitioner, State of New Jersey Department of Education, in the Court of Appeals for the Third Circuit.

in 1970-71, Newark had the highest population turnover in the nation. Indeed, Model Cities data indicate that mobility rates reached as high as 80% for schools in the Title I area.

The Department of Health, Education and Welfare Audit Agency conducted an audit of the Title I program in Newark for the period from September 1, 1970 to August 31, 1973.* During that three-year period, of the $156,166,574 in Title I funds received by the State of New Jersey, $28,709,198 was allotted to the City of Newark (PNJa5). The initial audit report of the Newark Title I program was received by the New Jersey Department of Education on October 21, 1974 while the final report was dated June 20, 1975. This was followed by a Final Audit Determination Letter, dated June 11, 1976, which demanded that New Jersey repay $132,467 expended by allegedly ineligible Newark schools during fiscal year 1970-71 and $1,029,630 expended by allegedly ineligible schools in 1971-72. There was no demand for the repayment of funds expended during the 1972-73 fiscal year since the auditors discerned no problems in the grant expenditures for that year.

On October 21, 1976, the State of New Jersey requested a review of the final audit determination thereby commencing an administrative proceeding which was not to conclude until 1980. During that entire proceeding, the State of New Jersey consistently pressed three arguments: (1) that the federal agency was without jurisdiction to demand repayment of allegedly misspent Title I moneys but was restricted to the express statutory remedy provided—the

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* The Office of Education in the Department of Health, Education and Welfare is the predecessor to the Department of Education created by the Department of Education Organization Act, Pub.L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3508 (Supp. III 1979)).

withholding of future entitlements of Title I funds; (2) that recalculations made in accordance with education regulations and guidelines demonstrated that 11 of the schools declared ineligible by the HEW auditors were, in fact, eligible; and (3) that Newark had such a high district-wide percentage of children from low-income families that the entire district qualified for designation as a Title I area. The Education Appeal Board, in a decision dated February 19, 1980, totally rejected these arguments and once again demanded that the State of New Jersey repay $1,031,304 to the United States Office of Education. The only difference between this amount and the sum demanded in 1976 was $130,613, an amount concededly barred by operation of the applicable statute of limitations. 20 U.S.C. § 884 (1976). By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States Department of Education.

The State of New Jersey, Department of Education, filed a Petition for Review of the Secretary of Education's decision with the United States Court of Appeals for the Third Circuit, pursuant to 20 U.S.C. § 2851. In its Petition, New Jersey advanced its substantive arguments as well as pursuing its contention that the United States Department of Education was without statutory authorization to order the State to repay Title I moneys but was limited to withholding future payments. Although the petitions were never formally consolidated, the Third Circuit issued a single opinion granting the Petitions for Review of both New Jersey and Pennsylvania and reversing the Orders of the Department of Education which had required the repayment of previously received Title I funds (Pa25).*

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* Pa—refers to the Appendix submitted on behalf of T. H. Bell in support of the present Petition for Writ of *Certiorari*.

The underpinning of the Third Circuit's decision was the "overarching principle" of *Pennhurst State Sch. & Hospital* v. *Halderman*, 450 U.S. 989 (1981) "that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant" (Pa14). The Court below found that at the time the Title I grants were made to New Jersey and Pennsylvania, Congress had not statutorily authorized the federal agency to order the repayment of misspent or misapplied funds. Indeed, it was not until five years after the last of the disputed funds were received, that the 1978 Amendments to the Elementary and Secondary Education Act specifically authorized the federal agency to order repayment of misspent or misapplied funds. 20 U.S.C. § 2835. The Third Circuit also considered and rejected the federal government's argument that it had a common law right to recover misspent funds which right could be exercised within the context of an administrative proceeding. The Court below held that "if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common law right to recover misspent funds, it may do so only by maintaining a civil action in a court of competent jurisdiction" (Pa25).

A Petition for Rehearing was denied by the Third Circuit in an Order entered December 17, 1981. The Secretary, on May 17, 1982, filed the instant Petition for Writ of *Certiorari*.

ARGUMENT

The decision of the Third Circuit represents a well reasoned application of the *Pennhurst* rationale which is entirely consistent with basic principles of statutory construction and the weight of judicial precedent and any conflict between the Third and Fourth Circuits on the retroactive application of the 1978 statutory amendments, authorizing the Federal government to order states to repay misspent Title I moneys, to pre-1978 grants is a conflict of extraordinarily narrow dimension which does not warrant review by this Court.

The opinion below does not deprive the United States Department of Education of any remedy needed to assure compliance with the complex requirements of the Title I program or to further the overall effectiveness of this "valuable national educational program" (Pa24). Rather, the Third Circuit opinion simply holds that the Department, in discharging its regulatory functions, is limited to those remedies specifically authorized by statute. Prior to the 1978 Amendments, the Department could withhold future Title I funds or disapprove applications if States were found out-of-compliance with Title I requirements. In 1978, Congress expanded those remedies specifically authorizing the Department to order States to repay misspent or misapplied funds. Since the New Jersey and Pennsylvania cases involved grant moneys received in 1970 through 1973, a full five years before "repayment" was added to the Department's available remedies, the Department was limited in resolving those cases to withholding future grant moneys or disapproving grant applications within the context of an administrative proceeding. Furthermore, the Court below did not deny the existence of a common law right of recoupment. Rather, it correctly held that if the Department seeks to recover pre-1978 Title I

funds, and not simply withhold future Title I moneys, it would have to exercise that common law right by maintaining a civil action in a Court of competent jurisdiction. Since the opinion below is consistent with this Court's decision in *Pennhurst State School & Hospital* v. *Halderman, supra,* and is consistent with applicable rules of statutory construction and the weight of judicial precedent and is of such limited applicability, this Court should decline to grant the writ of *certiorari.*

In *Pennhurst State School & Hospital* v. *Halderman, supra,* this Court concluded that:

> ". . . legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. [citations omitted] There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [citations omitted] By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 101 S.Ct. at 1539-40.

Applying this fundamental principle, it was determined in *Pennhurst* that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6080, did not contain such clear and unambiguous expression of intent as would impose affirmative obligations on the states

to provide mentally retarded persons with appropriate treatment in the environment that would be least restrictive of their personal liberty.

The Third Circuit, in its decision below, faithfully applied the *Pennhurst* rationale finding that a state could only exercise its prerogative to participate in a federal grant program "knowledgeably" and "in the public interest," if it were able to fully assess the program's possible risks and benefits. Since the only sanctions available to the federal government when the controverted Title I funds were received by New Jersey and Pennsylvania were the withholding of future Title I funds and the disapproval of Title I applications, the Court concluded that the States were prevented from making an "informed" assessment of the risks of participation in a program which also included the remedy of repayment. The Court below, therefore, refused to apply retroactively newly adopted statutory amendments providing for repayment of misspent or misapplied funds—a sanction created by statute five years after the last of the disputed funds at issue here were received by New Jersey.

The Third Circuit holding was eminently correct. The fact that New Jersey and Pennsylvania chose to participate in the Title I program after the sanction of repayment was included among the remedies available to the federal government does not undermine its logic. The decision to participate in the Title I program after Congress, in clear and ambiguous terms, had authorized the federal government to order States to repay misspent or misapplied funds, permitted the States to make the "informed" choice required by *Pennhurst*. Furthermore, the "risk" of the repayment sanction in 1978 when it was specifically authorized by Congress is significantly different from the risks this sanction would have engendered during the early years of the Title I program. This Court

may take judicial notice of the fact that there is a greater potential for confusion and consequent good faith errors in the start-up phase of a program than where a program has an established track record. The New Jersey case exemplifies precisely that risk. Because of the unavailability of complete statistical data as to the number of children eligible to attend schools in each specific attendance area, the Newark school district was forced to use an alternate method to calculate Title I eligibility. This lack of complete statistical information, together with the confused state of Title I rules and regulations during the early years of the program, provided the factual basis for the Newark audit dispute. Under such circumstances, the risk occasioned by the "repayment" sanction, had it been available during the early years of Title I, would have been considerable. Indeed, it can be argued that Congress withheld the repayment sanction until such time as the federal government upgraded its implementation of the Title I program and State and local governments had readily available adequate statistical data with which to accurately calculate Title I eligibility to compensate for these disparate risks.

The Seventh Circuit in *Lieberman* v. *University of Chicago,* 660 F.2d 1185 (7th Cir. 1981) *cert. denied* 50 U.S. L.W. 3839 (Apr. 19, 1982) engaged in a similar application of the *Pennhurst* rationale. In that case, the Court held that the Education Amendments of 1974 do not impliedly provide a damages remedy to an individual allegedly discriminated against on the basis of her sex. In reaching this conclusion, the Court found that both Title IX and its legislative history were silent as to the existence of a damages remedy for sexual discrimination.

> "However, the implication of a damages remedy would impose a potentially massive financial lia-

> bility upon the institutions whose 'acute financial distress' triggered the legislation. . . . this potential liability would be a significant factor which the recipients would need to consider before it could be said that they had exercised their choice 'knowingly, cognizant of the consequences of their participation', *Pennhurst,* 101 S.Ct. at 1540." *Lieberman, supra,* 660 F.2d at 1188.

It was, therefore, concluded that "as a matter of statutory construction" no implied damages remedy exists since "if Congress had intended to create a remedy for damages, it would have done so explicitly." *Id. See also*: *State of Cal.* v. *Block,* 663 F.2d 855 (9th Cir. 1981) (The Court refused to apply amendments to the 1964 Food Stamp Act which gave clearer authority to the Department of Agriculture to collect money from erring States since the acts of the State of California, at issue, occurred before the effective date of those amendments.)

The decision in *Pennhurst* and that of the Third Circuit below is clearly consistent with:

> "[T]he first rule of construction . . . that legislation must be considered as addressed to the future, not the past . . . [and] a retrospective operation will not be given to a statute which interferes with *antecedent rights* . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' *Greene* v. *United States,* 376 U.S. 149, 160 (1964) (quoting *Union Pacific Railroad* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913)). See *United States* v. *Richardson,* 512 F.2d 105, 106 (3d Cir. 1975)." (Pa12) (Emphasis added).

It is recognized, of course, that a Court will generally apply the law in effect at the time it renders its decision unless doing so would result in "manifest injustice" or there is statutory direction or legislative history to the contrary. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The concerns relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Bradley, supra*, 416 U.S. at 717. It is clear from *Pennhurst*, that this Court would view a subsequent change in law which varied the terms of the "contract" in a federal grant program as resulting in such "manifest injustice" as to preclude its retroactive application. The appropriateness of this characterization is readily apparent when the nature of the parties in the present matter is considered. The real parties in interest here are not simply the State and Federal Governments —but the children in the Newark school system. The retroactive application of the repayment sanction could well deprive those educationally deprived children presently enrolled in the Newark system of moneys otherwise available to them for current educational services. Such application, to punish possible administrative errors which occurred during the 1971-1972 fiscal year and which have long since been prospectively remedied, is manifestly unjust and surely would not be countenanced by this Court any more than it was permitted by the Third Circuit in its decision below.

The Secretary also argues, at some length, that the Court below incorrectly deprived the Department of its common law right to order states to repay allegedly misapplied Title I grant moneys. This contention is singularly lacking in merit. Preliminarily, since the 1978

Amendments specifically authorize the Department to order states to repay misspent or misapplied Title I grant moneys, the Department's common law argument relates solely to currently pending pre-1978 Title I appeals. Most significantly, the Department seeks to support its common law argument with cases which simply stand for the proposition that recoupment is available as a "self help" measure where the federal government holds money due a recipient. *See United States* v. *Carr,* 132 U.S. 644 (1890) (Postmaster General withheld portion of salary due Carr who had not performed mail deliveries as directed); *Wisconsin Central R. Co.* v. *United States,* 164 U.S. 190 (1896) (post office withheld payments due land grant company to recoup higher rate erroneously paid by post office to that company); *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112 (1920) (Postmaster General deducted the amount of overpayents to a land grant company from moneys otherwise payable to that company); *Collins* v. *Donovan,* 661 F.2d 705 (8th Cir. 1981) (government deducted erroneous overpayment from benefits due recipient); *Jacquet* v. *Westerfield,* 569 F.2d 1339 (5th Cir. 1978) (current assistance grants under Aid to Families with Dependent Children program reduced to recoup prior overpayments of benefits). Even the decision in *Mount Sinai Hospital* v. *Weinberger,* 517 F.2d 3229 (5th Cir. 1975) *cert.* denied 425 U.S. 935 (1976) simply involved "recoupment" achieved by an offset of funds not yet disbursed by the federal government. Since the Department has always had available to it the statutory remedy of "withholding" Title I moneys, it simply has never had to exercise the comparable common law "self help" remedy described in these cases. Indeed, the only case cited by the Secretary wherein the government sought to "recover" money already in the hands of the recipient is *United States* v. *Wurts,* 303 U.S. 414 (1938). Most importantly, a judicial

suit rather than an administrative remedy was initiated in *Wurts* to recover those moneys. It was precisely this conclusion which the Third Circuit correctly reached below—if the federal government determined to recover pre-1978 Title I grant moneys from the States, it would have to do so in a court of competent jurisdiction and not within an administrative proceeding. This conclusion, supported by the cases advanced by Petitioner, does not warrant review by this Court.

The Secretary contends, however, that this Court should grant *certiorari* since the decision below conflicts with that of the Fourth Circuit in *State of W. Va.* v. *Secretary of Ed.*, 667 F.2d 417 (4th Cir. 1981). In the latter decision, it was held that the Secretary of Education could order West Virginia to repay $125,000 which had been misspent for the construction of an administrative office complex. The Secretary argues that:

> "Unless the circuit conflict is resolved, and the decision below reversed, the Secretary must either undertake the expensive, time-consuming, and duplicative effort of pursuing these claims in a number of district courts despite the favorable ruling of the Fourth Circuit, or he must face further delays in his attempts to recoup the funds on the basis of the Board hearings, while other states, relying on the decision below, challenge his authority in courts of appeals that have not spoken on the issue. Only a prompt decision by this Court can avoid the inevitable expense, delay, and administrative confusion created by this conflict." (Pb11 to Pb12).

Pursuant to Rule 17(1)(a), a conflict between or among circuits is an element which will be considered by this Court when determining whether to exercise its discretion and grant a petition for writ of *certiorari*. However, the

mere existence of a conflict is clearly not determinative. The present case does not disclose an irreconcilable conflict among or between the circuits or even a situation where one circuit reviews and specifically rejects the decision of another circuit. For all practical purposes, the Third and Fourth Circuits issued their respective opinions simultaneously and any conflict between these decisions is spontaneous rather than studied and intentional. Furthermore, the conflict, such as it is, concerns the retroactive application of a statutory remedy, authorized in 1978, to audit appeals involving Title I ESEA grant moneys received by States prior to that year. It is, therefore, a conflict of uniquely limited dimensions which will be totally extinguished when the pre-1978 audit appeals are concluded.* Nor can the Secretary breathe new life into this conflict by contending that the decision below will broadly impact on the totality of federal grant programs. Although a court may seek guidance from the Third Circuit's disposition of pre-1978 Title I ESEA grant appeals, it is undisputed that litigation involving a particular federal grant program must be resolved within the precise and often complex statutory and regulatory structure governing that program.

This Court should, therefore, decline to grant the petition for writ of *certiorari* since the Third Circuit decision represents a well reasoned application of the *Pennhurst* rationale which is entirely consistent with basic principles of statutory construction and the weight of judicial prece-

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* The Secretary has informed this Court that 27 audit appeals involving Title I moneys received by States prior to 1978 are presently pending before the Education Appeal Board. To the extent that these appeals involve substantive challenges to the various audit determinations, however, the grant or denial of the instant Petition will simply not dispose of them.

dent and since any conflict between the Third and Fourth Circuits on the retroactive application of the 1978 statutory amendments, authorizing the federal government to order States to repay misspent moneys, to pre-1978 Title I audit appeals is a conflict of extraordinarily narrow dimensions which need not be reviewed and resolved by this Court.

CONCLUSION

For these reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

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STATE OF NEW JERSEY

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Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal statute must set forth in sufficient detail the conditions and sanctions imposed in a grant-in-aid program for the potential state grantee to make an informed decision regarding participation and possible liability.

2. Whether a federal grantor agency may disregard the express conditions and sanctions enumerated in a funding statute and create a new voluntary administrative process empowered to demand the return of expended funds.

3. Whether laws which impose sanctions on grantees can be retroactively applied.

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20 U.S.C.A. §241a (1974):

Congressional declaration of policy

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

20 U.S.C.A. §1223 (1978):

Advance appropriation of funds for elementary and secondary education programs

To the end of affording the responsible State, local, and Federal officers concerned adequate notice of available Federal financial assistance for education, appropriations for grants, contracts, or other payments under any applicable program are authorized to be included in the appropriation Act for the fiscal year preceding the fiscal year for which they are avail-

able for obligation. In order to effect a transition to this method of timing appropriation action, the preceding sentence shall apply notwithstanding that its initial application under any such Act will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the then current fiscal year and one for the succeeding fiscal year.

20 U.S.C.A. §241f(b) (1974):

Assurances from States; action by Commissioner on applications

(b) The Commissioner shall approve an application which meets the requirements specified in subsection (a) of this section and he shall not finally disapprove an application except after reasonable notice and opportunity for a hearing to the State educational agency.

20 U.S.C.A. §241j (1974):

Withholding funds for non-compliance with assurances

Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 241e(c) or 241f(b) of this title, the Commissioner shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall not make further payments under this subchapter to specified local educational agencies affected by the

failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this subchapter, or payments by the State educational agency under this subchapter shall be limited to local educational agencies not affected by the failure, as the case may be.

20 U.S.C.A. §241k (a) (1974):

Judicial review—Jurisdiction

(a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its application submitted under section 241e (c) or 241f (b) of this title or with his final action under section 241j of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

STATEMENT OF THE CASE

In 1965, what was then the Office of Education (OE or the agency) in the Department of Health, Education and Welfare (HEW)[1] began administration of Title I of the Elementary and Secondary Education Act of 1965 (ESEA)[2] the statute which is the subject of the present petition. According to the funding pattern of this law, the Office of Education channeled federal money to local educational agencies (LEAs) through state educational agencies (SEAs). 20 U.S.C.A. §§241a-241c (1974) (amended Supp. 1982). This funding pattern was designed to insure the provision of educational services by the LEAs that the federal government could not itself provide. The program was designed to meet the need perceived by Congress to supplement financially the educational programs in schools where high concentrations of low-income families in the area impaired the ability of the LEA to support adequate educational programs for dis-

[1] The Office of Education was transferred out of the Department of Health, Education and Welfare and became the United States Education Department on May 6, 1980. During the period relevant to this case, the Office of Education administered the Title I program and was headed by a Commissioner of Education. Under the Education Department, the office of Commissioner was replaced by the Secertary of Education. 20 U.S.C.A. §§3401-3510 (Supp. 1982).

[2] Title I of the Elementary and Secondary Education Act of 1965 has been amended extensively over the years, substantially so in 1978 and again in 1981. The law in effect at the time is codified at 20 U.S.C.A. §§241a-241m (1974) (amended Supp. 1982).

advantaged children. 20 U.S.C.A. §241a (1974) (amended Supp. 1982).

In title I, Congress provided a carefully constructed statutory scheme to channel funds to the LEAs by means of payments made to the SEA according to detailed application and payment procedures. 20 U.S.C.A. §§241f, 241e (1974) (amended Supp. 1982). Funds were made available in advance of expenditures in order to afford adequate notice to officials responsible for administering the program of available federal financial assistance. 20 U.S.C.A. §1223 (1978). The utilization of this advance funding method was designed to add certainty to the yearly program implementation so that Congress's goal of overcoming the impact of concentrated poverty on education could be achieved.

The Commissioner of Education was required to assure the proper functioning of the program according to the detailed statutory provisions by restricting the flow of federal money to any noncomplying program. The Commissioner's obligation in this regard was established in 20 U.S.C.A. §241f(b) (1974) (amended Supp. 1982), providing for approval or disapproval of applications; and 20 U.S.C.A. §241j (1974) (amended Supp. 1982), providing for withholding funds. Under §241f, an application must meet certain requirements to be approved; reasonable notice and an opportunity for a hearing had to be provided prior to disapproval. Under §241j, the Commissioner was required to withhold funds where there had been a failure to comply substantially with the Title I law. The funds were to be withheld until the SEA was able to prove to the satisfaction of the Commissioner that the program was in compliance. The withholding section, like the application disapproval section, required

reasonable notice and opportunity for a hearing before utilization of the remedy.

Pennsylvania elected to participate in the Title I program as it was established by this statutory scheme. Between 1966 and 1973, the Pennsylvania SEA applied for and received almost $444,144,000.00 which is disbursed to more than 500 LEAs throughout the Commonwealth on a yearly basis. Each year the Pennsylvania SEA was visited by program officials from the Office of Education who reviewed our administration of the Title I program. Never was there a suggestion that the program was noncomplying, substantially or otherwise, or that funds should be withheld or denied.

In 1971 and again in 1973, the audit agency of HEW conducted a program review of Title I as it was administered in Pennsylvania from 1967 through 1973. In 1975 a report was issued by the audit agency recommending the payment of approximately $10,000,000.00 from the Pennsylvania SEA for Title I programs in seven LEAs. Although these programs were believed by the LEAs to be operated pursuant to the applicable legal requirements, they were found by the auditors to have permitted benefits to inure to ineligible children and schools. At this time, the original $10,000,000.00 figure claimed by the auditors has been reduced to $422,424.29.

With the final audit determination letter, Pennsylvania was notified that it could contest the agency's demand for repayment of funds in a hearing before a body called the Title I Audit Hearing Board. Lacking statutory authority for its creation, the Title I Audit Hearing Board was established voluntarily and operated without published rules according to unpublished guidelines which were

routinely made available to parties appearing before it. No statutory authority required that a hearing be provided in cases where repayment was demanded because no statutory provision existed giving OE the power to demand a refund.

Although the Title I statute permitted an appeal to the United States Circuit Court by an SEA subjected to application disapproval or withholding of funds,[8] no judicial review was available for audit hearing board decisions. Clearly the courts could not exercise jurisdiction over the decisions of a voluntarily established board that existed without statutory authority and that purported to impose penalties unauthorized by statute. *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979).

The Education Amendments of 1978 substantially revised Title I. 20 U.S.C.A. §§1234-1234e, 2701-2854 (Supp. 1982). Sections were added to provide for audit determinations and the collection from the SEA of any amount found to have been misspent under the law. 20 U.S.C.A. §1234a (Supp. 1982). The Education Appeal Board was established to hear disputes between the agency and the SEA regarding allegations of misexpenditures and demands for payment. 20 U.S.C.A. §1234 (Supp. 1982). Procedures, including judicial review of audit findings, were statutorily established. 20 U.S.C.A. §1234d (Supp. 1982).

Regulations implementing the statutory requirements of the Education Appeal Board were finally promulgated in 1979 and this Board assumed jurisdiction over pending

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[8] 20 U.S.C.A. §241k (1974) (amended Supp. 1982).

Title I audit cases. In the instant case, the Title I Audit Hearing Board provided a hearing on the Pennsylvania audit exception pursuant to its unauthorized procedures and then decided the case with the imprimatur of the statutorily authorized Education Appeal Board.

Recently the Title I law has been substantially revised again and reenacted as Chapter 1 of the Education Consolidation and Improvement Act of 1981. This most recent version of the law is in effect at the present time.

SUMMARY OF ARGUMENT

The United States Office of Education demanded that the Pennsylvania SEA pay from its own sources funds allegedly misexpended by LEAs prior to 1973. Although the law in effect at the time permitted remedies of withholding funds or disapproval of applications when Title I programs were perceived to be improperly implemented, OE sought to use the remedy of repayment which was not authorized by the statute. The Title I statute was subsequently amended in 1978, but it is the law that is in effect when the SEA decides to accept funds under the grant program and the alleged misexpenditures occur that should govern. In this case, the programs at issue were concluded and the funds expended at least five years before the change in the law. An SEA cannot be held to the terms of the statute of which it is unaware at the time of its action. This Court's decision must, therefore, be limited to the Title I statute as it existed prior to 1978.

The opposing decisions of the Third and Fourth Circuit do not require the intervention of this Court for resolution. The Fourth Circuit did not fully consider the issues raised before the Third Circuit and was further influenced by its own prior decision in a similar case. Most importantly, the Fourth Circuit failed to consider this Court's recent decision in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), and was, therefore, not fully informed of the law.

The Third Circuit's decision is restricted to a narrow issue involving pre-1978 Title I law. Petitioner's claims that the decision will undermine the enforcement mechanism of all grant statutes is unsupported. The enforcement authority of agencies with respect to their statutory grant programs must be determined on a case-by-case basis. The huge sums of federal money asserted by the petitioner as being threatened by the Third Circuit's opinion are also unsupported. Petitioner's argument that expediency requires that these matters be heard by administrative agencies in the first instance is no substitute for the lack of congressional authorization to pursue a repayment remedy.

ARGUMENT

1. Pennsylvania embarked upon the Title I program pursuant to a law that was specific and detailed in laying out the statutory scheme for meeting the objective of providing financial assistance to schools in areas of concentrated poverty. Title I represented not only a carefully structured method for accomplishing educational goals but also an equally specific and carefully constructed scheme for enforcing the specific requirements of the funding program. Under this scheme the Commissioner of the Office of Education as well as the SEA and the LEAs had specific responsibilities for accomplishing their mutual purpose of meeting the objectives of the statute. Whereas LEAs had the responsibility of designing and implementing a conforming program,[4] and the SEA had the responsibility of approving LEA applications and disbursing funds,[5] the Commissioner had the parallel responsibility of either approving or disapproving the SEA's annual applications[6] or of withholding funds to SEAs where substantial noncompliance with the Title I program is found.[7]

This was the law and these were the conditions governing the Title I program when Pennsylvania decided to participate. This was the law in effect during the years that Pennsylvania provided the Title I programs in those LEAs that were ventually subjected to the audit which

[4] 20 U.S.C.A. §241e (1974) (amended Supp. 1982).
[5] 20 U.S.C.A. §241f (1974) (amended Supp. 1982).
[6] 20 U.S.C.A. §241f (1974) (amended Supp. 1982).
[7] 20 U.S.C.A. §241j (1974) (amended Supp. 1982).

formed the basis of the Commissioner's claim against Pennsylvania. This was the law that was in effect when the audit was conducted, when the auditors' report and recommendations were issued, when the Office of Education's final determination was made against Pennsylvania, and when proceedings commenced before the Title I Audit Hearing Board. The Third Circuit's decision in this case is confined strictly to this very narrow and limited area of law: Title I of the Elementary and Secondary Education Act of 1965 as it existed prior to the Education Amendments of 1978.[8]

It is the 1978 Amendments which the petitioner cites as the law controlling in the instant case and as statutory authority for the agency's action in demanding repayment for programs concluded prior to 1973. Yet it is the law that is in effect at the time the program money is accepted and the alleged infractions occur that must be examined to uncover support for the sanctions sought to be imposed. Amendments passed in 1978, five years after the programs in question were concluded and the federal money disbursed, cannot be hailed as authority to demand retroactively repayment of money long since expended. Pennsylvania had no clue when it expended its Title I funds in good faith that it would be liable for repayment of those funds when, years later, the federal agency asserted several LEA programs failed to conform exactly with every detail of the regulations. That the agency should utilize such a penalty, rather than withholding funds prospectively until compliance was achieved as was

[8] The Title I statute has been amended regularly by Congress, but the basic enforcement scheme was constant from the enactment of Title I in 1965 to the Education Amendments of 1978.

clearly required by the statute, could not have been anticipated by the State.

This Court recently stated in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), that conditions in federal grant-in-aid programs must be voiced unambiguously:

> our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted). The clear statement by this Court, that a state cannot be held to secret conditions in a grant program in which it innocently participated with a justifiable expectation that the statutory scheme in existence at the time the program was implemented was the controlling law, is consistent with well established rules against retroactive application of statutes. Absent unequivocal indications to the contrary within the

legislation, statutes are addressed to the future only and cannot interfere with or control preexisting rights. *Greene v. United States*, 376 U.S. 149 (1964).

This Court's consideration would, therefore, be limited to interpreting the application of enforcement provisions contained in a narrow section of Title I of the ESEA as it existed prior to 1978. The Court's review could only affect Title I audit cases which occurred during that limited period and which have not already been decided or otherwise settled. The Court's decision would thus have minimal utility as precedent in future cases since it would apply only to a small and decreasing number of disputes. Since the situation presented by this case is unlikely to repeat itself, evaluation of the merits of this matter by this Court would not resolve any issue of special importance. Sup. Ct. R. 17.

2. Petitioner urges this Court to grant certiorari in order to resolve a conflict between the Third and Fourth Circuit Courts and to resolve it consistently with the Fourth Circuit decision. The opposing results reached by the two Circuits, however, are not of such significance as to require the intervention of this Court to achieve a resolution.

Initially it must be noted that the asserted conflict was not the result of the considered decision of one Circuit Court to reject the view of another. Rather, the difference in opinions arose unawares since the two decisions were issued virtually simultaneously, within two days of each other. The Fourth Circuit, therefore, did not have the benefit of the reasoning of the Third Circuit in making its decision.

Furthermore, the Fourth Circuit had previously decided a Title I audit case adversely to the state without considering the legal arguments which formed the basis of the Third Circuit's decision. *New Jersey v. Hufstedler*, 662 F.2d 208 (3rd Cir. 1981); *West Virginia v. Commissioner of Education*, No. 79-1338 (4th Cir. 1980) (unpublished per curiam) (App. A, *infra*, p 1a). The Fourth Circuit may well have considered itself bound by its prior decision finding a liability for repayment, and found itself constrained by this precedent to uphold the authority of the agency. When the issues considered by the Third Circuit were finally and belatedly raised in the Fourth Circuit's second case, the Court could have been influenced by its prior decision to give the arguments less than their proper weight.

Of greater importance, however, is the Fourt Circuit's failure to apply this Court's decision in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), in reaching its decision. Without the guidance of *Pennhurst*, and with the precedence of its previous, unpublished decision, the Fourth Circuit was not informed as to the law underlying the issues it was deciding. The Fourth Circuit's decision was not well considered and, although its holding is in opposition to that of the Third Circuit, does not represent a conflict such as requires resolution by this Court.

3. The decision of the Third Circuit is restricted to the narrow issue of the authority of the Office of Education to demand payment under Title I of ESEA as it existed prior to 1978. Application of this decision to other federal grant-in-aid programs is not likely unless a similar enforcement structure can be shown to be part of the statutory scheme in those programs. The petitioner's

allegations of dire effects on other agencies' audit authority is unsupported by citation to comparable statutes which would be subject to the same interpretation. Similarly, allegations of challenges to audit repayments by other grant recipients stimulated by the decision below are based on information and reports personal to the petitioner and are not supported by the record in this case or any verifiable authority.

The petition expresses fears that disruption in the agency's preferred method of enforcement by means of repayment will result in delay and confusion and imperil huge amounts of uncollected claims. According to the GAO report cited in the petition in support of this contention,[9] delay and confusion is already rampant in agency enforcement proceedings.

Furthermore, allegations that huge amount of uncollected audit claims are at stake are misleading because they are based on inflated audit figures. Total amounts claimed by the auditors are inevitably reduced due to such considerations as the application of appropriate statutes of limitations or inability to support factually alleged misexpenditures. In the present case, the auditors' initial recommendation with regard to Pennsylvania's Title I program was for the payment of over $10,000,000.00. After consideration by the agency and application of the statute of limitations, the amount was reduced to $422,424.29.

Additionally, settlement of Title I audit cases arising prior to 1978 is continuing to occur and settlement figures are a small fraction of the original amount claimed by

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[9] Comptroller General, Federal Agencies Negligent in Collecting Debts Arising From Audits (1982).

the auditors to be owing. The petitioner's fears that the enforcement of all grant programs will be jeopardized and that vast sums of money will be lost result from an overreaction to one adverse decision in a single grant program operated for a limited period of time.

The far reaching effects which petitioner envisions emanating from the Third Circuit's decision are illusory. Each audit case has to be decided on its own facts pursuant to the controlling law. As Richard Cappalli states in his treatise *Rights and Remedies Under Federal Grants* 98 (1979):

> Each grant program is authorized and established independently of others, with its own set of rights and duties. Thus, noncompliance must be judged on a program-by-program basis.

Because of the variation in the statutory schemes governing federal grant programs, any challenges to agency authority to enforce grant conditions have to arise on a case-by-case basis regardless of the Third Circuit's opinion, and regardless of the decision of this Court in reviewing it.

Similarly, the allegation that the decision below would open the floodgates of litigation is overstated. If the method of enforcement through repayment which the agency has appropriated unto itself in this case is determined to be unauthorized, petitioner foresees an alarming multitude of grantees in other programs asserting their rights in court. Whether the absence of such authority would be found in any grant statute other than Title I still remains to be seen; but even if it were the case, the argument is a poor one. The agency's chosen method of enforcement may be to its liking but, if it is not what Congress provided for in the authorizing statute, adminis-

trative convenience will not save it. Expediency is not a reason to second-guess Congress. By overreaching its statutory authority, the agency is substituting its own judgment for that of Congress and assuming for itself the prerogatives of the legislative branch of government.

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: July 14, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1338

The State of West Virginia,

Petitioner

versus

Commissioner of Education, Office of Education, Department of Health, Education & Welfare,

Respondent

Petition for Review of Order of Commissioner of Education, Office of Education, Department of Health, Education and Welfare

Submitted October 1, 1980; Decided November 4, 1980.

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, Circuit Judge

(Chauncey H. Browning, Attorney General, F. Layton Cottrill, Jr., Assistant Attorney General on brief) for Petitioner; (Robert J. Arnot, Philip H. Rosenfelt, Educa-

tion Division, Office of the General Counsel, Dept. of HEW on brief) for Respondent.

PER CURIAM:

West Virginia seeks review of a final action of the Commissioner of Education finding that the state misspent $63,026 in Title I education funds and requiring repayment. We need not resolve the difficult problem of this court's jurisdiction because we find the state's position on the merits unpersuasive.

The state argues that a variation in the amount demanded by the Office of Education abrogated the adequacy of its notice of the issues before the Title I Audit Hearing Board, whose position the Commissioner adopted. The HEW Audit Agency concluded in 1975 that $63,026 had been misspent. The Office of Education only demanded repayment of $53,710, however, when the state submitted evidence that $9,316 of the questioned expenditures were proper. In 1977, the Office of Education reexamined the submission and added a claim of $9,316, bringing the total sum demanded to the amount recommended by the Audit Agency. The state had sufficient notice of the issues and amount demanded to formulate an informed response in 1975. The state sparked the variation in the demand, and the claim presented to the Title I Audit Hearing Board was fixed over nine months before the Board issued its decision at the amount originally asserted. West Virginia was afforded notice adequate to prepare its response.

The state's other contentions are similarly unpersuasive and do not merit discussion.

PETITION DENIED.

Office - Supreme Court, U.S.
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JUL 19 1982
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CLERK

No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY, RESPONDENT

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA, RESPONDENT

BRIEF AMICUS CURIAE OF THE STATE OF MARYLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COMMONWEALTH OF PENNSYLVANIA, RESPONDENT

BRIEF AMICUS CURIAE OF THE STATE OF MARYLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The State of Maryland, by its Attorney General, submits this brief amicus curiae in support of the Secretary of Education's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981).

INTEREST OF AMICUS CURIAE

The State of Maryland is acutely interested in this Court's disposition of the Secretary of Education's (the "Secretary") petition. Like Respondents New Jersey and Pennsylvania, Maryland participates as a grantee in the funding program provided by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. IV) 2701 *et seq.* ("Title I"). After two final audit determinations of the Department of Education's Assistant Secretary for Elementary and Secondary Education concerning Title

I funds spent during fiscal years 1975-1978, the Secretary ordered Maryland to refund $10,875,333 in funds allegedly spent in violation of Title I or its implementing rules and regulations. Maryland received written notice of those determinations on August 3 and October 7, 1981.

On October 7 and November 6, 1981, the Education Appeal Board of the Department of Education (the "Board") accepted Maryland's applications for review of the final audit determinations. *See* 47 Fed. Reg. 6685-86 (February 16, 1982). The proceedings before the Board are currently pending.

One of the issues in dispute raised by Maryland in the applications for review is that under the provisions of Title I in effect during the applicable time period, the Secretary had no authority to order Maryland to refund the contested funds. In support of its position on that issue, Maryland cited the decision below, *New Jersey v. Hufstedler,* 662 F.2d 208 (3d Cir. 1981), in which the United States Court of Appeals for the Third Circuit held that the Secretary lacked both statutory authority and a common law right administratively to recoup illegally expended pre-1978 Title I funds.

On October 15, 1981 — just two days after the Third Circuit decided *Hufstedler* — the United States Court of Appeals for the Fourth Circuit issued a decision in direct conflict with the Third Circuit's ruling: *West Virginia v. Secretary of Education,* No. 80-1704 (4th Cir. Oct. 15, 1981). Without oral argument, the Fourth Circuit ruled in an unpublished, per curiam opinion that the Secretary had both statutory and common law authority to order, after administrative proceedings, West Virginia to repay Title I funds illegally expended before 1978. Under the Fourth Circuit's local rules, the *West Virginia* decision would have had little or no precedential authority had it remained unpublished. *See* 4th Cir. R. 18(c) & (d). However, on

November 16, 1981, the Secretary, by motion, asked the Court to publish its opinion. By a letter dated November 24, 1981, Maryland (which had not previously participated in the appeal) requested the Court to reaffirm its decision not to publish the opinion. Maryland suggested that it would be inappropriate for the *West Virginia* decision to become the law of the Circuit because in rendering that decision the Court had had no opportunity to consider the Third Circuit's analysis of the extent of the Secretary's authority in *Hufstedler* and because neither the parties in their briefs nor the Court in its opinion mentioned this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), in which the Third Circuit found strong support for its decision.

On December 23, 1981, the Court granted the Secretary's motion, and the *West Virginia* decision was published. 667 F.2d 417 (1981). On April 26, 1982, this Court denied West Virginia's motion to direct the Clerk of the Court to accept for filing an untimely petition for certiorari seeking review of the Fourth Circuit's decision.

The Fourth Circuit's ruling in the *West Virginia* case is the law of the Circuit. As such, it may be followed by the Education Appeal Board in the Board's consideration of applications for review filed by states within the Fourth Circuit's jurisdiction. *See* 20 U.S.C. § 1234d (Supp. III 1979) (authorizing appeals from adverse decisions of the Board to the United States Court of Appeals for the Circuit in which the adversely affected party is located). Thus, if the Fourth Circuit's *West Virginia* decision stands, Maryland's position with respect to the Secretary's authority can be expected to be rejected summarily by the Board, and subsequently on appeal to the Fourth Circuit, despite the existence of compelling authority not considered by the Fourth Circuit supporting Maryland's position, namely, this Court's decision in *Pennhurst* and the Third Circuit's decision in *Hufstedler*.

SUMMARY OF ARGUMENT

The Secretary's petition for a writ of certiorari must be granted to resolve the direct conflict between the decisions of the United States Courts of Appeals for the Third and Fourth Circuits with respect to the Secretary's authority to require refunds of misspent Title I funds after an administrative hearing. Unless that conflict is resolved by a definitive ruling from this Court, the Education Appeal Board will be forced to apply inconsistent rules of law in the cases before it involving audit claims of Title I funds received before 1978 and in each appeal of a Board decision to a federal court of appeals that has not yet spoken on the issue, the court will be free to adopt either the Third or the Fourth Circuit's position, thus creating further confusion.

ARGUMENT

Maryland asks the Court to grant the Secretary's petition in order to review and affirm the decision below.

Because the Third Circuit's decision below in *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981), is in direct conflict with the Fourth Circuit's decision in *West Virginia v. Secretary of Education*, 667 F.2d 417 (4th Cir. 1981), one of the "special and important reasons" identified in Supreme Court Rule 17 as supporting the granting of a petition for a writ of certiorari exists in this case. The Secretary's petition gives this Court the opportunity to provide a definitive ruling on the issue that divided the Third and Fourth Circuits, an issue the absence of a clear resolution of which impedes the Secretary's ability efficiently to administer a grant program of vital national importance as well as the States' efforts to implement that program.

Unless the conflict between the Third and Fourth Circuits is resolved, the Education Appeal Board will be

forced to apply one rule of law in reviewing audit determinations involving Title I funds in cases from the states comprising the Fourth Circuit — Maryland, North Carolina, South Carolina, Virginia, and West Virginia — and another in cases from the states comprising the Third Circuit — Pennsylvania, Delaware, and New Jersey. The extent of the Secretary's authority to require states in other circuits to pay refunds of misspent pre-1978 Title I funds after an administrative hearing will not be clear until every other federal court of appeals has ruled on the issue.

Because of the nature of the Fourth Circuit's decision in the *West Virginia* case, the current state of the law is particularly unsatisfactory to Maryland and the other states over which that Court has jurisdiction. As discussed above, the Court decided the case without the benefit of oral argument by counsel and announced its decision in a short per curiam opinion that the Court initially ordered not to be published.

Because the Court's discussion of the Secretary's authority to require refunds of misspent Title I funds after an administrative hearing is very brief — one paragraph — it may be quoted in full:

> "It is also clear that the Board has the authority to order the refund. Section 185(b) of the Act, 20 U.S.C. § 2835(b), grants the Secretary specific authority to require the repayment of funds determined to have been misspent. The Secretary ordered West Virginia to repay the funds in June, 1977; the hearing, although requested in 1977, was not held until 1979 and the decision was reached in 1980. Section 185(b) was enacted in 1978. There is no legislative indication that the authority to order repayment is to be effective only prospectively, and the statute's remedial purposes will be more fully served by applying it retroactively. Even if this were not so, the Secretary can, independently of specific statutory authority,

> recover funds which are granted for specific purposes and misspent in contradiction of those purposes. *See Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329, 337 (5th Cir. 1975) *cert. denied*, 425 U.S. 935, 96 S. Ct. 1665, 48 L. Ed. 2d 176 (1976)."

667 F.2d at 419.

That extract reveals the most troubling aspects of the Fourth Circuit's decision. First, in rendering that decision the Court had no opportunity to consider the Third Circuit's analysis of the extent of the Secretary's authority in *Hufstedler*. Second, neither the parties in their briefs nor the Court in its opinion mentioned this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), in which the Third Circuit found strong support for its decision in *Hufstedler*.

Although Maryland agrees with the Secretary that this Court should review the Third Circuit's decision in *Hufstedler* in order to resolve the circuit conflict, it disagrees with the Secretary's assertion that the Third Circuit's decision should be reversed because the Court misinterpreted controlling legal principles. Unlike the Fourth Circuit's decision in the *West Virginia* case, the Third Circuit's opinion provides a thorough discussion of Title I, its legislative history, and numerous relevant cases and, Maryland submits, reaches the correct conclusion with respect to the Secretary's authority.

Most importantly, the Third Circuit addressed the significance of the *Pennhurst* decision, in which this Court enunciated the principle that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant. *See* 451 U.S. at 15-18. Applying that principle, the Third Circuit ruled that the Secretary lacked specific statutory authority to order the repayment of pre-1978 misspent funds because the only express authorization to recoup was provided in the 1978

amendments to Title I (codified at 20 U.S.C. § 2835(b) (Supp. IV)), amendments which could not be applied retroactively to funds received and spent prior to their effective date. 662 F.2d at 213-14. Completely ignoring *Pennhurst*, the Fourth Circuit relied on those 1978 amendments as the Secretary's statutory authority to order a refund.

CONCLUSION

For the reasons stated, the Secretary's petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1982

FILED

SUPREME COURT OF THE UNITED STATES CLERK

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY,

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY,

T. H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The State of West Virginia urges this Court to grant the Petition for Certiorari herein, and affirm the decision of the Third Circuit on the merits. West Virginia is within the geographical jurisdiction of the United States Court of Appeals for the Fourth Circuit, which court has determined that the United States Department of Education has authority to order the State of West Virginia to reimburse $125,000.00 of a 1975 Title I grant. State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981) (App. A, infra, 1a-10a). This decision, like the decision of the Third Circuit complained of by the Secretary of Education in his petition, reviewed the authority of the Agency to recover Federal funds distributed to the states which are determined by Agency audits to have been misapplied under the terms of Title I of the

Elementary and Secondary Education Act of 1965* and its implementing rules and regulations.

In 1978, Congress enacted a statute specifically authorizing the Agency to "require the repayment of Federal funds which were misspent or misapplied." 20 U.S.C. § 2835(b). But the determinations complained of by New Jersey, Pennsylvania, and West Virginia all occurred prior to the effective date of said statute. The Third Circuit held that without specific statutory authority, the Secretary could not recover such funds. State of New Jersey, Department of Education v. Hufstedler, 662 F.2d 208, 218 (3rd Cir. 1981). Two days later the Fourth Circuit reached the opposite conclusion

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* The Act was amended by The Strengthening and Improvement of Elementary and Second Schools Act of 1978, Pub. L. 95-651, and is codified at 20 U.S.C. § 2701 et seq.

(App. A. pp. 5a-6a). West Virginia encourages this Court to settle the resulting conflict.

SUMMARY OF ARGUMENT

The purposes of Title I of the Elementary and Secondary Education Act of 1965 are not well served by the Agency's actions in seeking such refunds. West Virginia expended its disputed funds in a manner well calculated to address, in good faith, the needs of the children served by the program.

The State of West Virginia spent these funds without knowledge that they could be recovered. The evidence of West Virginia's "misapplication" of the $125,000.00 showed no bad faith expenditures, but rather a highly technical misapprehension of the Agency's administrative regulations. The State was not precognizant. It could not anticipate the later decisions of the Secretary,

the Education Appeal Board, and the Fourth Circuit Court of Appeals. The statutes under which it received the funds gave no notice that such funds would have to be reimbursed. Thus, West Virginia's choice to expend the funds was not exercised knowingly. It is unfair to penalize the students who are the present beneficiaries of free schooling because of past expenditures which were justifiably considered valid and unreimbursable under then existing law. Similar considerations apply to the disputed expenditures of Pennsylvania and New Jersey.

ARGUMENT

The State of West Virginia presently relies heavily on the Federal funds distributed to it under the Title I program and uses those funds to support remedial basic skills programs for disadvantaged children. (App. C.) Were it not for these funds, those school districts in West Virginia with a

low property tax base would be unable to provide specialized remedial programs to the relatively high percentage of disadvantaged children that live in such districts.

The Title I program has been particularly successful in West Virginia. Since 1978, West Virginia has measured the basic skills of children receiving Title I instruction. These measurements prove that these children improve their skills at a rate significantly greater than the general population of students. (App. D.)

Fayette County, the West Virginia school district which "misapplied" $125,000.00, is a property-poor district with a high percentage of disadvantaged children. Thus, while Statewide Title I funds constitute only four percent of the total expenditures by the State's school districts, they constitute seven percent of Fayette County's budget.

In 1975, pursuant to its responsibility for innovative program development, Fayette County requested the State Department of Education to approve the expenditure of $125,000.00 of Title I funds to build that portion of an administrative office building devoted to Title I personnel. The State, pursuant to its responsibility to insure that all proposals conform to current Title I guidelines, approved the expenditure. (Management of Title I funds is left to state and local authority, subject to audits by the Agency. A detailed history of these facts is contained in Appendix B, the decision of the Education Appeal Board, at 1b to 4b.) Both Fayette County and the State of West Virginia assumed that the expenditure was authorized by 20 U.S.C. § 241e(a)(1) (1974), which allows expenditures for the construction of "necessary school facilities."

The Agency disagreed, interpreting "school facilities" to mean "classrooms

and related facilities," not administrative offices. (App. B pp. 5b-9b.) Fayette County and West Virginia had no reason to anticipate that "related facilities" would take on such a narrow meaning, and only by equivocal legal reasoning did the Appeal Board reach such a definition.

But these fine distinctions take on no overwhelming importance unless the misapplied funds must be reimbursed after they have been expended. There was nothing in the statutes defining the Agency's authority that granted it the power to compel such reimbursements.

The purpose of the ambitious Title I program was to use the spending power of Congress to provide resources calculated to counteract "direct link between economic privation and educational underachievement." State of New Jersey, Deparment of Education v. Hufstedler, supra, at 210.

Since the funds are allocated on the basis of the level of economically deprived children within a state, school district, and school, those districts with a relatively higher percentage of deprived students receive relatively greater funds. The unfortunate result is that it is these districts which, owing to the complexity and logistics of a large scale Title I program, are most likely to inadvertently misapply funds. Additionally, such school districts, being funded in part by a relatively smaller tax base than wealthy districts, have fewer resources for "double-checking" their proposals against the "fine print" of administrative regulations and vague statutes.

Congress, of course, may attach conditions to the use of "shared" revenue, and sanctions or internal controls can achieve the goal of enforcing the conditions. But where Congress has not seen fit to demand reimbursements of misspent funds, or to

authorize the Agency to demand reimbursement, it is unjustifiable to assume that such authority exists "by common law" or otherwise. Pennhurst State School v. Halderman, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981).

Just as a criminal sanction defines the culpability of a behavior, or as a liquidated damages clause defines the economic consequences of a breach of contract, the consequences to a school district attached to a particular manner of spending defines the conditions of a spending power grant.

It has never been suggested that West Virginia's use of the disputed $125,000.00 undermined the purposes of Title I, and no one has suggested that its use was in bad faith. West Virginia's error was void of moral turpitude. The Agency has no "equitable" claim to the funds. There was no unjust enrichment to dignify the Agency's collection efforts.

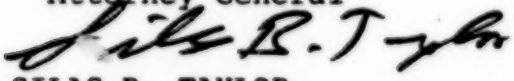
West Virginia believes that the largest portion of disputed Title I misexpenditures nationwide is equally non-culpable. Perhaps Congress' failure to provide the Agency with collection power recognized the counter-productiveness of reimbursements. But whether such was Congress' intent is unimportant. Had it intended to utilize such a sanction, it would have been addressed in the statutory scheme. The Third Circuit correctly resisted the temptation to engraft on the Agency a power it did not possess by statute. Being a creature of statute, and neither a creature of common law nor equity, its powers are limited by the statutes it serves.

CONCLUSION

For the reasons stated, the Petition should be granted and the Third Circuit affirmed.

Respectfully submitted,

CHAUNCEY H. BROWNING
Attorney General



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1704

The State of West Virginia, Petitioner,

v.

Secretary of Education, The United States Department of Education, Respondent.

Petition for Review of an Order of the United States Department of Education.

Submitted: April 8, 1981
Decided: October 15, 1981

Before BRYAN, Senior Circuit Judge, PHILLIPS and SPROUSE, Circuit Judges.

(Ann V. Dornblazer, Assistant Attorney General on brief) for Petitioner; (Kay Rigling Gill, Stephen H. Freid, Office of General Counsel, U. S. Dept. of Education on brief) for Respondent.

UNPUBLISHED TO PUBLISHED

PER CURIAM:

The State of West Virginia petitions for review of an order of the Secretary of Education requiring it to refund $125,000 previously received under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241a et seq. (The Act).[1] Since we find that the Secretary utilized permissible procedures and acted on a substantial factual basis, we affirm.

The Act is administered by the United States Department of Education through state and local educational agencies. In 1975, the Fayette County (West Virginia) Board of Education, the local agency involved, requested that the West Virginia State Board of

---

[1] The Act was amended by The Strengthening and Improvement of Elementary and Secondary Schools Act of 1978, Pub. L. 95-651, and is codified at 20 U.S.C. § 2701 et seq..

Education, the state agency, approve an amended plan permitting the local agency to spend $125,000 of Title I funds to meet part of the building cost for a county school board administrative office complex. The $125,000 was allocated to that portion of the building complex to be occupied by Title I personnel. The state board approved the expenditure of funds and the building was constructed. Subsequently, the Health, Education and Welfare Audit Agency conducted an audit of the local agency's Title I program and in 1977 recommended, among other things, that the local agency be required to refund the $125,000 to the United States as having been misspent. This recommendation was accepted by the United States Department of Education, and the West Virginia Department of Education appealed to the predecessor of the Education Appeal Board. After the appeal was transferred to it for disposition, the Education Appeal Board (the Board) conducted a pre-hearing conference and received briefs and related

material. It concluded that the funds were not spent for "school facilities" and that the construction was not essential to the success of the Title I program, as required by the Act. The Secretary of Education adopted the findings and rulings of the Board.

West Virginia contends that the Board lacked statutory authority to order the refund, that it was denied an evidentiary hearing before the Board, and that the Board erroneously concluded that the funds were misspent in violation of the Act.

There is no merit to West Virginia's contention that the Board was without statutory authority to hear the appeal. It was established in 1978 pursuant to 20 U.S.C. § 1234, and interim final regulations were published in the Federal Register in May, 1979, 44 Fed. Reg. 30528-34 (1979), clearly stating that pending appeals were transferred to the Board from its predecessor and specifically listed the

appeal sub judice as one of the appeals to be determined by the Board. 44 Fed. Reg. 43807 (1979). We perceive no infirmity in that procedure nor from the fact that Congress later attempted to disapprove the final regulations subsequently issued by the Board.

It is also clear that the Board has the authority to order the refund. Section 185(b) of the Act, 20 U.S.C. § 2835(b), grants the Secretary specific authority to require the repayment of funds determined to have been misspent. The Secretary ordered West Virginia to repay the funds in June, 1977; the hearing, although requested in 1977, was not held until 1979 and the decision was reached in 1980. Section 185(b) was enacted in 1978. There is no legislative indication that the authority to order repayment is to be effective only prospectively, and the statute's remedial purposes will be more fully served by applying it retroactively. Even if this were not so, the Secretary can, independently of specific statutory

authority, recover funds which are granted for specific purposes and misspent in contradiction of those purposes. See Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F.2d 329, 337 (5th Cir. 1975) cert. denied, 425 U.S. 935 (1976).

Likewise, there is no merit in West Virginia's contention that it was impermissibly denied an evidentiary hearing before the Board. The Board conducted a "pre-hearing" conference, and it was not clear from West Virginia's position there or subsequently that it desired an evidentiary hearing. On appeal, West Virginia advances several general reasons underlying its argument that the building's construction was essential to the purposes of the Act, but the basic facts are undisputed, and the record before the Board, consisting of briefs and exhibits, furnished it with a sufficient factual background on which to apply the Act's provisions.

West Virginia contends substantively that it was entitled to spend the $125,000 on the construction of an administrative office complex. The Board ruled to the contrary, finding that the building was not a "school facility" as defined by the Act. 20 U.S.C. § 244(13).

Section 141(a)(1) of the Act provided in pertinent part that Title I funds could only be used for:

> the excess cost of programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this title, the training of teachers, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of

> educationally deprived children in school attendance areas having high concentrations of children from low-income families. . .

20 U.S.C. § 241(a)(1). Section 403(13) of the Act provided that:

> The term school facilities means classrooms and related facilities (including initial equipment) for free public education and interests in land (including site, grading and improvements) on which such facilities are constructed, except such term does not include those gymnasiums and similar facilities intended primarily for exhibitions for which admission is to be charged to the general public.

20 U.S.C. § 244(13).

The same definition of school facilities was contained in section 116.1(w) of the Act's regulations then in effect. 45 C.F.R. § 116.1(w) (1974).

The Secretary interprets the phrase "classrooms and related facilities" to mean space utilized to supplement services and activities for children, that it does not include administrative offices, and contends that even classroom facilities were not allowed to be constructed with Title I funds "unless such construction is demonstrated as being essential in order to assure the success of a program or project under Title I of the Act," citing 45 C.F.R. § 116.17(i) (1974). West Virginia, on the other hand, urges that the administrative office space was a "related facility" essential for Fayette County's Title I project. The resolution of these contentions involves a narrow interpretation of the applicable statutes and regulations. Neither legislative history nor other decisions of the Secretary provide any clues as to what that interpretation should be. In such circumstances courts, of course, give deference to an agency's interpretation of a statute governing it and its own regulations. See United States v.

Larionoff, 431 U.S. 864, 872 (1977); Commonwealth of Virginia ex rel. Coleman v. Califano, 631 F.2d 324, 327 (4th Cir. 1980). Seeing no reason why that principle should not be followed in this instance, and concluding that the Secretary had a substantial factual basis for finding that the local agency misspent the involved funds for construction of the administrative office com- plex, the order of the Secretary is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1704

FILED
Dec 23 1981
William K. Slate,II
Clerk

The State of West Virginia,

Petitioner,

versus

Secretary of Education, etc.,

Respondent.

O R D E R

Upon consideration of the petitioner's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED and GRANTING

respondent's motion to publish the opinion.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Bryan, Judge Phillips, and Judge Sprouse.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX B

EDUCATION APPEAL BOARD
U.S. DEPARTMENT OF EDUCATION

Appeal of:	)	
	)	Docket Number
	)	3-(33)-77
The State of	)	Audit Control No.
	)	03-70002
West Virginia	)	
	)	

PANEL'S DECISION

I. Preliminary Statement

The West Virginia Department of Education (SEA) on July 13, 1977, filed a timely Application for Review appealing from a final audit determination dated June 14, 1977, made by the Deputy Commissioner for Elementary and Secondary Education (Deputy Commissioner) of the U.S. Office of Education (OE). The audit determination covered activities conducted under Title I of the Elementary and Secondary Education Act of 1965, as amended (Title I), in Fayette County, West Virginia, from July 1, 1973, through June 30, 1976, and requested the SEA to refund $125,000.

A three-member Panel was appointed to hear the appeal. A prehearing conference was held on November 19, 1979. The SEA and the Deputy Commissioner participated and later filed briefs and other materials. Neither of the parties requested an evidentiary hearing. The Panel concluded after consideration of the prehearing conference record and the written submissions that only legal issues were involved and that an evidentiary hearing was not necessary.

II. Facts

In April 1975, the Fayette County Schools (LEA) proposed an amendment to its Title I project application requesting the SEA's approval for the use of Title I funds for partial payment of continuation of costs for a new administrative office building. On September 10, 1975, the SEA determined that Title I personnel would require 29 percent of the LEA office complex and thereupon approved the use of Title I funds to pay

for 29 percent or $125,000, whichever was less, of the total cost of constructing the office complex. Thereupon the LEA spent $125,000 in Title I funds on such construction. Subsequently, the HEW Audit Agency performed an audit of the Title I programs of the LEA and concluded that the $125,000 of Title I funds had been improperly used.

On July 13, 1977, the SEA appealed from the final determination of the Deputy Commissioner approving the audit finding, and requested a hearing. By letter dated August 15, 1977, the Chairman of the Audit Hearing Board granted the request. After appointment of the Hearing Panel, a prehearing conference was held on November 19, 1979, at which it was determined that there was no dispute regarding the facts and that the following legal issues must be decided:

(1) Does the term "school facilities" as used in Section 141(a)(1) of the Title I statute

(20 U.S.C.§241e(a)(1)(1974)) and as used in Section 116.1(w) of the Title I Regulations (45 C.F.R. §116.1(w) (1974)) allow the use of Title I funds to pay for construction of administrative offices which house Title I personnel?

(2) Were the administrative offices, constructed to house Title I personnel, essential to the success of the Title I program in Fayette County?

III. Opinion

I. The Panel holds that Title I funds cannot be used to help pay construction costs of an administrative office building.

Relevant language of Section 141(a)(1) of the Title I statute (20 U.S.C. §241e(a)(1)(1974)) authorizes the expenditure of Title I funds only for:

> ...programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families.... (Emphasis supplied).

The term "school facilities" is defined in Section 403(13) of the Elementary and Secondary Education Act (20 U.S.C. §244(13)(1974)) as follows:

> The term "school facilities" means classrooms and related facilities (including initial equipment) for free public education and

> interests in land (including site, grading, and improvements) on which such facilities are constructed, except that such term does not include those gymnasiums and similar facilities intended primarily for exhibitions for which admission is to be charged to the general public.

The public statutory definition of "school facilities" is repeated almost verbatim in Section 116.1(w) of the Title I regulations (45 C.F.R. §116.1(w)(1974)).

The definition limits "school facilities" to "classrooms and related facilities," i.e. facilities used directly for instruction purposes. An administrative office is not such a purpose.

Excepted from the general approval of "school facilities" are "those gymnasiums and similar facilities intended primarily for exhibitions for

which admission is to be charged to the general public." Counsel for the SEA has argued that, under the principle of statutory construction that "the expression of one thing is the exclusion of another" (expressio unius est exclusio alterius), the express exclusion of "gymnasiums and similar facilities" would allow the inclusion of administrative facilities.

The argument is phrased "...the Congress specifically excluded gymnasiums and similar facilities and, therefore, one must assume that all other support facilities essential to the success of the Title I programs are included within the meaning of school facilities." (SEA Brief p.5). "Gymnasiums and similar facilities" are, however, "school facilities" included within the basic definition of "school facilities" and therefore require an express exception in order to be excluded. In contrast, administrative offices are not included within the basic definition. Therefore the offered

principle of statutory construction does not apply.

The SEA also argues that the definition of "school facilities" found in Section X 35 10 of the Standard Terminology for Curriculum and Instruction in Local and State Schools Systems published in 1970 by the National Center for Education Statistics under the direction of the Commissioner of Education defines "school facilities" to include "services supporting construction." (SEA Brief pp. 5-6). However, a definition in the Standard Terminology cannot override an express statutory definition.

The SEA also argues that, in a Michigan audit, "the Office of Education held that Title I funds could properly be used for the acquisition and remodeling of administrative offices to house Title I personnel." (SEA Brief, pp. 6-7). The record now available on the Michigan case is not clear in regard to funding of administrative offices.

In any event, it would still be necessary for the Panel to apply existing law and regulations.

Therefore, this Panel holds that Title I funds cannot be used to help pay construction costs of an administrative office building.

II. The Panel holds that administrative offices, constructed to house Title I personnel, were not essential to the success of the Title I program in Fayette County.

Section 141(a)(1) of the Title I statute (20 U.S.C. §241e(a)(1)(1974)) authorizes construction of school facilities only "where necessary."

Section 116.17(i) of the Title I regulations (45 C.F.R. §116.17(i)(1974)) requires that:

> "No application for a project grant under Title I of the Act may cover the construction of

> school facilities unless such construction is demonstrated as being essential in order to assure the success of a program or project under Title I of the Act...."

It must be noted that the authorization of construction of essential school facilities is limited to "school facilities" and that this Panel is holding that administrative offices are not "school facilities." Even if administrative offices, however, were to be treated as "school facilities," construction of these administrative offices was not essential to the success of the Title I program.

The SEA describes the conditions that required construction of administrative facilities as "not optimal." (SEA Brief p. 8). The statement is consistent with statements in the SEA's Application for Review regarding "overcrowded conditions," "isolating the Title I program staff," and "reduced efficiency." Assuming these statements

to be accurate, they do not support a finding that the construction of administrative facilities was essential.

Similarly, the SEA argues that Title I gives primary responsibility to local officials for designing and implementing Title I programs. (SEA Brief p.9). Granting that such an observation is accurate, it is still necessary for local officials to act within the law.

The SEA also argues that present use of the constructed facilities includes Title I parent use of conference rooms and use by Title I classes of "materials and equipment available in the resource center area." (SEA Brief p. 10) Such uses, particularly that by Title I classes of materials and equipment, might well have been important in justifying the new facility as "essential" if they had been contemplated and described at the time of the original application. The SEA states, however, that: "These additional uses

by both Title I parents and children were not considered in the Title I personnel space occupancy which justified used(sic) of the Title I funds." (SEA Brief p. 10). The present use of the building comes too late to justify its construction.

Therefore the SEA must refund $125,000 to the U.S. Department of Education.

Pursuant to Subpart F Section 100d.81 of the Regulations of the Department of Education prescribed for the Education Appeal Board (45 Fed. Reg. 22634 (April 3, 1980)), the Board Chairperson will submit the Panel's decision to the Secretary of Education. Each party has the opportunity to file comments and recommendations on the Panel's decision with the Board Chairperson within 15 calendar days of the date the party receives the Panel's decision. The Panel's decision becomes the final decision of the Secretary 60 calendar days after the date the SEA

receives the Panel's decision, unless the Secretary, for good cause shown, modifies or sets aside the Panel's decision.

EDUCATION APPEAL BOARD

/s/Harry Hogan
Harry Hogan, Chairman
Cora Beebe
Aloysius McCabe

Date: June 20, 1980

APPENDIX C

Summary of

ESEA TITLE I

in West Virginia

Program Elements and Approved Expenditures,
Regular Term Fiscal Year 1981

Bureau of Services and Federal Assistance

Roy Truby
State Superintendent of Schools
Charleston, West Virginia
1981

Figure 1 graphically illustrates the relative proportion of the total amount of Title I funds budgeted and approved state-wide in West Virginia for each of the major budgetary categories contained in Table 3 for Fiscal Year 1981.

FIGURE 1

GRAPHIC ILLUSTRATION OF ESEA TITLE I APPROVED EXPENDITURES FOR LOCAL INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA BY MAJOR BUDGET CATEGORY FOR FISCAL YEAR 1981

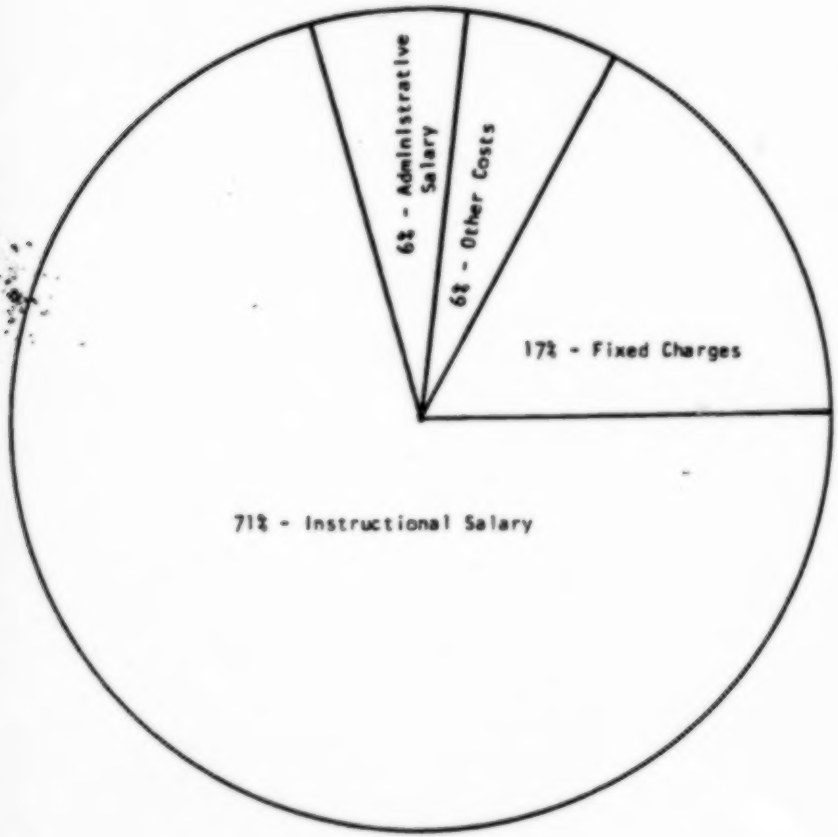

FIGURE 2

GRAPHIC ILLUSTRATION OF THE NUMBER OF LEAS PROVIDING ESEA TITLE I READING INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA BY GRADE LEVEL FOR FISCAL YEAR 1981

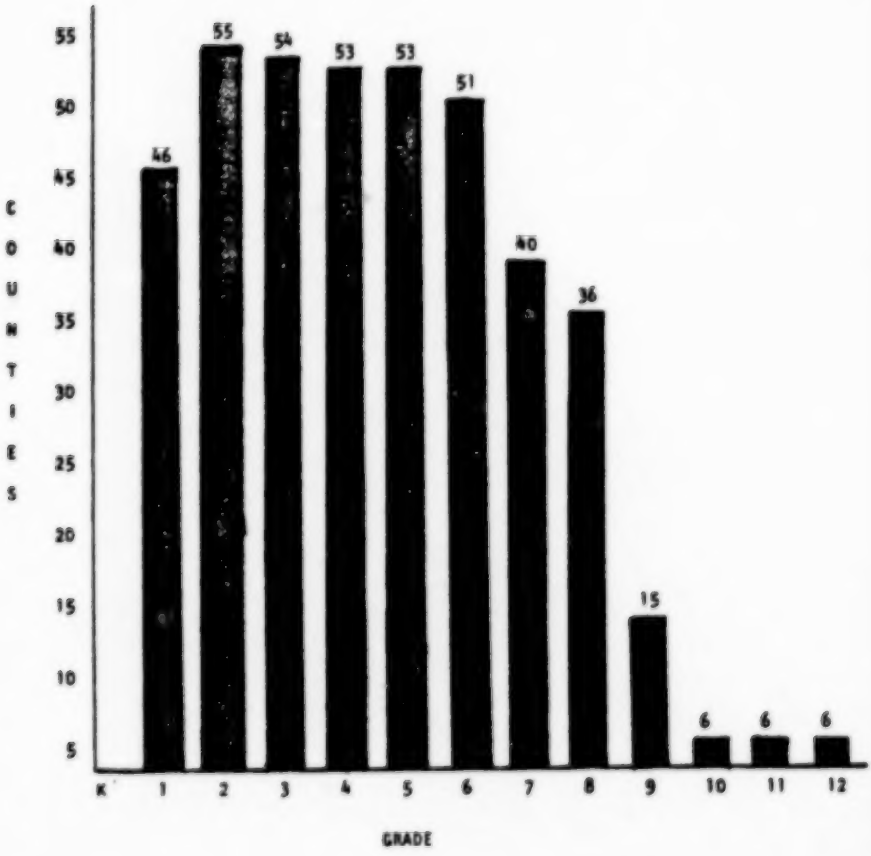

FIGURE 3

GRAPHIC ILLUSTRATION OF THE NUMBER OF LEAS PROVIDING TITLE I MATHEMATICS INSTRUCTION IN WEST VIRGINIA BY GRADE LEVEL FOR FISCAL YEAR 1981

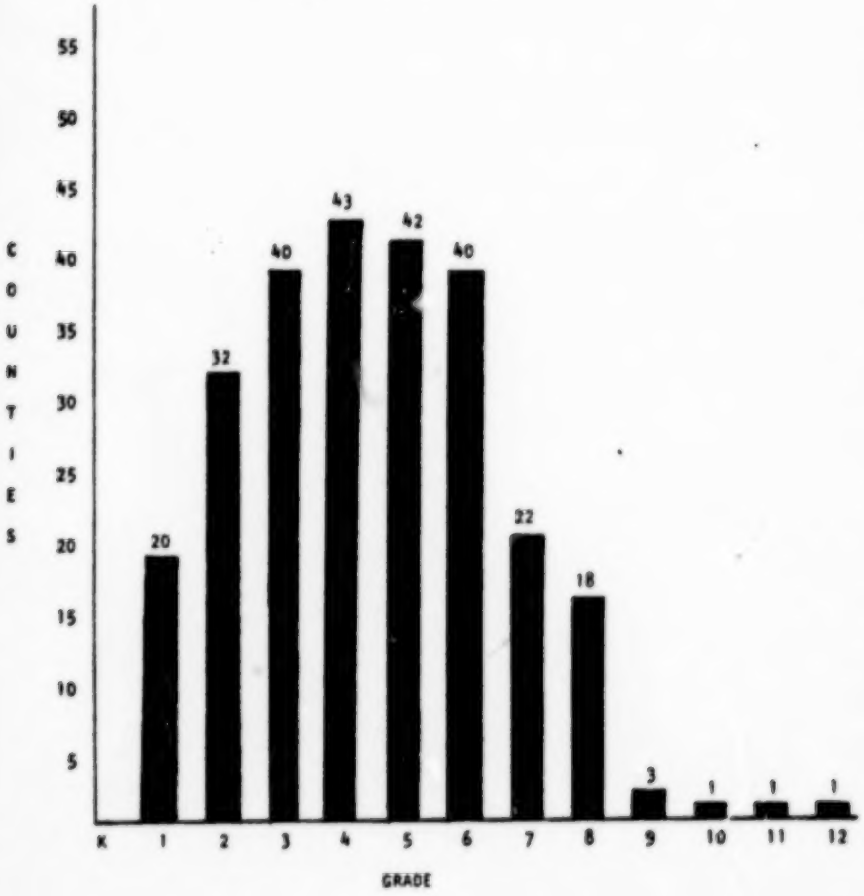

TABLE 6

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOLS SERVED
BY ESEA TITLE I INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA
BY COUNTY, BY SCHOOL CLASSIFICATION FOR FISCAL YEAR 1981

1	2	3	4	5	6
County	School Classification				
	Elem.	Middle	Junior	Senior	Total
Barbour	4	2			6
Berkeley	14				14
Boone	9		1		10
Braxton	6	3			9
Brooke	4	2		1	7
Cabell	24		5		29
Calhoun	4			1	5
Clay	7		1		8
Doddridge	10				10
Fayette	26	7			33
Gilmer	5				5
Grant	3		1	1	5
Greenbrier	10		9		19
Hampshire	8		2		10
Hancock	8				8
Hardy	3	2		1	6
Harrison	24				24
Jackson	6	2			8
Jefferson	5				5
Kanawha	47				47
Lewis	10		2		12
Lincoln	13		1		14
Logan	22		2		24
Marion	11		2		13
Marshall	8				8
Mason	11		1		12
McDowell	11	1	2	4	18
Mercer	15		1	5	21
Mineral	6	2	1	1	10
Mingo	22		1		23
Monongalia	24		1	1	26
Monroe	4		2		6
Morgan	4	1	1	1	7
Nicholas	18				18
Ohio	5		2	1	8
Pendleton	5	4	1	1	11
Pleasants	1	1			2
Pocahontas	3	3		1	7
Preston	12				12
Putnam	13	3			16
Raleigh	27				27
Randolph	10		4	4	18

TABLE 6 (CONTINUED)

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOLS SERVED
BY ESEA TITLE I INSTRUCTIONAL PROGRAMS IN WEST VIRGINIA
BY COUNTY, BY SCHOOL CLASSIFICATION FOR FISCAL YEAR 1981

1	2	3	4	5	6
County	School Classification				
	Elem.	Middle	Junior	Senior	Total
Ritchie	6				6
Roane	7		1		8
Summers	6			1	7
Taylor	2		1	1	4
Tucker	4				4
Tyler	2	2			4
Upshur	9	1			10
Wayne	13	2			15
Webster	4				4
Wetzel	5				5
Wirt	1			1	2
Wood	8		5		13
Wyoming	11	2			13
TOTALS	560	38	47	31	676

TABLE 9

DESCRIPTION OF APPROVED ESEA TITLE I EXPENDITURES IN WEST VIRGINIA FOR INSTRUCTION, BY COUNTY, BY PROGRAM ELEMENT, FOR FISCAL YEAR 1981

1	2	3	4	5
COUNTY	INSTRUCTIONAL PROGRAM ELEMENT			TOTAL INSTRUCTION
	READING	MATHEMATICS	OTHER	
Barbour	198,580	67,470		266,050
Berkeley	267,177	162,690		429,867
Boone	283,800	121,145		404,945
Braxton	224,293	189,255		413,548
Brooke	191,182			191,182
Cabell	553,651	246,780		800,431
Calhoun	66,693	51,191		117,884
Clay	204,966	36,287		241,253
Doddridge	106,298			106,298
Fayette	968,286		141,770	1,110,056
Gilmer	74,410	21,960		96,370
Grant	147,739	27,246		174,985
Greenbrier	541,085	167,464		708,549
Hampshire	130,368	84,433		214,801
Hancock	203,029			203,029
Hardy	129,575			129,575
Harrison	580,389	77,346		657,735
Jackson	128,540	74,593		203,133
Jefferson	121,467	82,260		203,727
Kanawha	1,798,501	576,667	385,273	2,760,441
Lewis	273,493	21,832		295,325
Lincoln	286,346	274,991		561,337
Logan	677,051	386,694		1,063,745
Marion	321,509	158,510		480,019
Marshall	230,312	58,713		289,025
Mason	206,216	171,944		378,160
McDowell	1,257,090	187,363	221,373	1,665,826
Mercer	811,296	203,268		1,014,564
Mineral	275,135	28,785		303,920
Mingo	361,288	198,328		559,616
Monongalia	314,589	115,384		429,973
Monroe	252,573			252,573
Morgan	112,116			112,116
Nicholas	365,030			365,030
Ohio	380,126	44,070		424,196
Pendleton	81,225	38,769		119,994
Pleasants	55,998	27,763		83,761
Pocahontas	141,719	78,298		220,017
Preston	592,021			592,021
Putnam	181,950	31,620		213,570
Raleigh	592,971	592,803		1,185,774

TABLE 9 (CONTINUED)

DESCRIPTION OF APPROVED ESEA TITLE I EXPENDITURES IN WEST VIRGINIA FOR INSTRUCTION, BY COUNTY, BY PROGRAM ELEMENT, FOR FISCAL YEAR 1981

1	2	3	4	5
COUNTY	INSTRUCTIONAL PROGRAM ELEMENT			TOTAL INSTRUCTION
	READING	MATHEMATICS	OTHER	
Randolph	234,357	188,327		422,684
Ritchie	147,578	23,103		170,681
Roane	220,588	24,174		244,762
Summers	426,152	14,150		440,302
Taylor	110,713		52,327	163,040
Tucker	103,308			103,308
Tyler	116,770			116,770
Upshur	251,052			251,052
Wayne	405,713	366,621		772,334
Webster	215,241	59,355		274,596
Wetzel	151,982	71,054	44,990	268,026
Wirt	62,202	46,534		108,736
Wood	393,442	119,428		512,870
Wyoming	356,137	356,137		712,274
TOTALS	$17,885,318	$5,874,805	$845,733	$24,605,856

TABLE 7

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOL STUDENTS
PARTICIPATING IN ESEA TITLE I INSTRUCTIONAL PROGRAMS
IN WEST VIRGINIA BY COUNTY, BY PROGRAM ELEMENT FOR FISCAL YEAR 1981

1	2	3	4	5
	STUDENTS PARTICIPATING			
	Duplicated Count			Unduplicated Count
County	Reading	Math	Other	
Barbour	388	108		427
Berkeley	905	573		1,448
Boone	718	540		941
Braxton	500	500		830
Brooke	380			380
Cabell	1,142	433		1,531
Calhoun	225	137		245
Clay	480	118		538
Doddridge	180			180
Fayette	1,902		94	1,996
Gilmer	170	75		220
Grant	275	48		295
Greenbrier	1,200	292		1,359
Hampshire	450	270		615
Hancock	360			360
Hardy	1,200	292		1,359
Harrison	1,380	285		1,530
Jackson	323	300		623
Jefferson	208	138		346
Kanawha	3,060	1,049	374	4,089
Lewis	564	65		594
Lincoln	760	875		875
Logan	1,116	1,054		1,074
Marion	451	137		518
Marshall	436	293		504
Mason	298	194		343
McDowell	2,700	285	375	2,760
Mercer	1,480	908		1,858
Mineral	425	60		500
Mingo	631	631		449
Monongalia	629	220		868
Monroe	328			328
Morgan	215			215
Nicholas	802			802
Ohio	623	182		646
Pendleton	144	169		240
Pleasants	104	142		220
Pocahontas	197	215		412
Preston	1,081			1,081
Putnam	720	188		861
Raleigh	1,931	1,779		2,149

TABLE 7 (CONTINUED)

DESCRIPTION OF THE NUMBER OF PUBLIC SCHOOL STUDENTS
PARTICIPATING IN ESEA TITLE I INSTRUCTIONAL PROGRAMS
IN WEST VIRGINIA BY COUNTY, BY PROGRAM ELEMENT FOR FISCAL YEAR 1981

1	2	3	4	5
	Duplicated Count			Unduplicated Count
County	Reading	Math	Other	
Randolph	549	458		744
Ritchie	292	60		314
Roane	503	56		559
Summers	634	35		680
Taylor	266		60	326
Tucker	202			202
Tyler	240			240
Upshur	460			460
Wayne	1,103			1,084
Webster	330			570
Wetzel	307	147	87	476
Wirt	137			230
Wood	780			940
Wyoming	579			1,139
TOTALS	36,863	13,311	990	44,573

TABLE I

DESCRIPTION OF THE ALLOCATION OF ESEA TITLE I FUNDS IN WEST VIRGINIA
FOR FISCAL YEARS 1966 THROUGH 1981, INCLUSIVE,
BY MAJOR ALLOCATION CATEGORY

1	2	3	4	5	6	7	8	9	10	11	12
FISCAL YEAR	PART A BASIC GRANT	PART B	PART C	HANDI-CAPPED	MIGRANT	NEGLECT-ED	DELINQUENT	ADULT CORRECT.	ADMINIS-TRATION	CONCEN-TRATION	TOTAL
1966	$ 16,991,225	$	$	$ 88,715	$	$	$	$	$ 170,799	$	$ 17,250,739
1967	14,658,391			83,449	17,194				147,756		14,923,368
1968	17,193,348			158,566	33,513				174,644		17,632,256
1969	15,569,731			167,756	5,226	13,312	61,479		143,680		15,961,095
1970	18,974,601			272,858	52,909	15,015	59,931		195,177		19,605,491
1971	20,524,496	60,538	290,778	281,387	94,000	20,539	155,756		213,921		21,641,415
1972	20,524,496	69,084	409,497	379,645	128,817	23,009	187,905		216,902		21,939,355
1973	*20,586,407		977,766	449,717	192,397	25,796	210,671		224,007		22,622,761
1974	**17,349,914	65,907	648,463	470,963	189,259	25,470	238,491		189,426		19,177,893
1975	16,348,525		183,227	470,963	204,992	25,470	238,491	30,101	175,061		17,676,830
1976	16,577,023			546,235	205,652	25,470	238,491	32,489	176,290		17,801,650
1977	17,686,814			546,235	205,639	25,470	238,491	53,011	187,592		18,943,253
1978	20,256,937			546,235	206,301	25,470	238,491	53,011	213,295		21,539,740
1979	25,261,940			546,235	205,457	25,470	238,491	63,546	263,450		26,604,589
1980	27,612,266			507,631	205,921	21,650	202,717	59,014	443,242	961,906	29,989,347
1981	27,929,965			549,674	205,921	18,402	172,309	81,763	443,914	636,308	30,038,236
TOTALS	$314,046,059	$195,529	$2,465,731	$6,066,274	$2,153,198	$379,207	$2,516,714	$367,935	$3,579,157	$1,578,214	$333,348,018

*Includes $61,911 reallocation of adult correctional funds to Part A funds.
**Includes $30,101 reallocation of adult correctional funds to Part A funds.

APPENDIX D

NCEs are an equal interval score that identifies the relative position of students on some testing instrument. NCE scores range from 1-99. A child's NCE score, under ordinary circumstances, would be consistent from year to year. In other words, a student scoring at the 40th NCE on an achievement test in the third grade would be expected to score at the 40th NCE when he reached the 6th grade. They were developed in a manner that makes them an equal interval scale which allows them to be averaged without distortion. Any change in a student's NCE score over a period of time should be the result of some intervention, such as a Title I program.

MEAN GAIN SCORES* BY YEAR, BY SUBJECT AND BY GRADE
FOR WEST VIRGINIA'S STUDENTS RECEIVING ESEA TITLE I INSTRUCTION

GRADE	1977-78		1978-79		1979-80		1980-81		GRA
	MATH	READ	MATH	READ	MATH	READ	MATH	READ	
2	10.5	7.6	4.6	7.2	5.3	4.5	3.2	2.7	2
3	7.5	4.1	6.3	4.7	3.9	3.0	2.9	2.3	3
4	10.5	5.6	8.6	4.5	7.0	4.7	5.5	4.0	4
5	8.3	5.8	5.6	3.0	2.8	3.9	2.8	2.7	5
6	3.8	4.8	5.3	3.4	5.7	3.6	4.5	3.4	6
7-12	10.9	6.4	6.9	4.3	5.1	4.7	4.4	4.1	7-12
2-12	7.8	5.7	6.4	4.7	5.1	4.1	4.0	3.2	2-12

*Mean gain scores are stated in NCEs (Normal Curve Equivalents).

CERTIFICATE OF SERVICE

I, Silas B. Taylor, Assistant Attorney General of the State of West Virginia, do hereby certify that three (3) true copies of the foregoing Brief of the State of West Virginia as Amici Curiae In Support of the Respondents were served by placing said copies in the United States mail with first-class postage prepaid on the 16th day of June, 1982, addressed as follows:

Philip H. Rosenfelt, Esquire
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CLERK

No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether federal agencies have authority to require federal grant-in-aid recipients to repay amounts that have been administratively determined to have been misspent, and to collect such amounts by administrative offset, when the governing grant statute does not explicitly provide such authority.

2. If not, whether the Education Amendments of 1978 authorize the Secretary of Education to take such administrative actions with regard to audit disputes pending when the Amendments became effective.

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TABLE OF AUTHORITIES

Cases:

American Federation of Government Employees v. *Nimmo*, 536 F. Supp. 707	24
Atwater v. *Roudebush*, 452 F. Supp. 622	18

Cases—Continued Page

Barlow v. *Collins*, 397 U.S. 159 24
Beazell v. *Ohio*, 269 U.S. 167 40
Bradley v. *Richmond School Board*, 416 U.S. 696 .. 38, 39
Burke v. *Southern Pac. R.R.*, 234 U.S. 669 17
Citizens to Preserve Overton Park Inc. v. *Volpe*, 401 U.S. 402 23
Collins v. *Donovan*, 661 F.2d 705 ..... 17, 24
Dobbert v. *Florida*, 432 U.S. 282 40
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 23
Grand Trunk W. Ry. v. *United States*, 252 U.S. 112 ..... 15, 16, 23
Gratiot v. *United States*, 40 U.S. (15 Pet.) 336 16
Greene v. *United States*, 376 U.S. 149 38
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 .. 38
Hallowell v. *Commons*, 239 U.S. 509 39
Harris v. *McRae*, 448 U.S. 297 16-17
Hastings v. *Earth Sattellite Corp.*, 628 F.2d 85 40
Hilburn v. *Butz*, 463 F.2d 1207, cert. denied, 410 U.S. 942 17
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 23
Jacquet v. *Westerfield*, 569 F.2d 1339 ..... 17, 24, 32
King v. *Smith*, 392 U.S. 309 16
Koger v. *Ball*, 497 F.2d 702 ..... 17, 40
Louisiana v. *Block*, 531 F. Supp. 118 24
McGee v. *Mathis*, 71 U.S. (4 Wall.) 143 17
McKnight v. *United States*, 98 U.S. 179 16
Montana Power Co. v. *FPC*, 445 F.2d 739, cert. denied, 400 U.S. 1013 39
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 42
Mt. Sinai Hospital v. *Weinberger*, 517 F.2d 329, cert. denied, 425 U.S. 935 ..... 12, 17, 32
Murray v. *Wilson Distilling Co.*, 213 U.S. 151 24
Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 ..... 12, 15, 17, 41, 42
Pennsylvania Power & Light Co. v. *FPC*, 139 F.2d 445, cert. denied, 321 U.S. 798 39
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 36

Cases—Continued **Page**

Rosado v. *Wyman*, 397 U.S. 397 ..... 16, 32, 39
South Carolina v. *Katzenbach*, 383 U.S. 301 27
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 41-42
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 42
Texas & N.O.R.R. v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 41
Thorpe v. *Housing Authority*, 393 U.S. 268 42
United States v. *Bank of Metropolis*, 40 U.S. (15 Pet.) 377 ..... 15, 17
United States v. *Barlow*, 132 U.S. 271 ..... 16, 17
United States v. *Bellard*, 674 F.2d 330 32
United States v. *Borin*, 209 F.2d 145, cert. denied, 348 U.S. 821 23
United States v. *Carr*, 132 U.S. 644 15
United States v. *Haughton*, 413 F.2d 736 40
United States v. *Mead*, 426 F.2d 118 23
United States v. *Munsey Trust Co.*, 332 U.S. 234 16
United States v. *City of San Francisco*, 310 U.S. 16 17
United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102 38
United States v. *Southwestern Cable Co.*, 392 U.S. 157 34
United States v. *United Mine Workers*, 330 U.S. 258 24
United States v. *Vanella*, 619 F.2d 384 40
United States v. *Wurts*, 303 U.S. 414 ..... 15, 16, 23
West Virginia v. *Secretary of Education*, 667 F.2d 417 ..... 17, 37, 38
Wilson Clinic & Hospital, Inc. v. *Blue Cross*, 494 F.2d 50 17
Wisconsin Cent. R.R. v. *United States*, 164 U.S. 190 ..... 15, 16

Statutes and regulations:

Accounting and Auditing Act of 1950, 31 U.S.C. 66a 30
Administrative Procedure Act, 5 U.S.C. 702 19
Budget and Accounting Act, 1921, 31 U.S.C. 41 25

Statutes and regulations—Continued: Page

Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. IV) 7405(e) 5
Coastal Zone Management Improvement Act of 1980, 16 U.S.C. 1456b(d) 5
Debt Collection Act of 1982, Pub. L. No. 97-365, Section 10, 96 Stat. 1794 26
Department of Education Organization Act, 20 U.S.C. (Supp. V) 3401 *et seq.*:
20 U.S.C. (Supp. V) 3411 9
20 U.S.C. (Supp. V) 3441 9
Department of Housing and Urban Development—Independent Agencies Appropriation Act of 1981, Pub. L. No. 96-526, 94 Stat. 3066 30
Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* 41
42 U.S.C. 6010 41
Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 463 6
Elementary and Secondary Education Act of 1965, Title I, 20 U.S.C. (Supp. V) 2701 *et seq.* 2, 6
20 U.S.C. (Supp. V) 2701 ..... 6, 18
20 U.S.C. (Supp. V) 2732 ..... 6, 18
20 U.S.C. (Supp. V) 2733 ..... 6, 18
20 U.S.C. (Supp. V) 2736 ..... 6, 18
20 U.S.C. (Supp. V) 2737 ..... 6, 18
20 U.S.C. (Supp. V) 2835 ..... 8, 6a-7a
20 U.S.C. (Supp. V) 2835(b) 12, 32, 36, 7a
20 U.S.C. (Supp. V) 2841 ..... 7, 20
20 U.S.C. (Supp. V) 2851 ..... 11, 19
Federal Claims Collection Act of 1966, 31 U.S.C. 951 et seq. 24
31 U.S.C. 952 ..... 2, 1a
31 U.S.C. 952(a) 24, 25, 27, 28
31 U.S.C. 952(b) 28
Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. (Supp. IV) 501 *et seq.* 3
41 U.S.C. (Supp. IV) 504(1) 3

Statutes and regulations—Continued — Page

General Education Provisions Act, 20 U.S.C. (& 1970 ed. & Supp. V) 1221 *et seq.*:
20 U.S.C. (Supp. V) 1226a-1 ..... 7, 20, 4a
20 U.S.C. (1970 ed.) 1232d 33
20 U.S.C. 1232c 8, 33
20 U.S.C. (1970 ed.) 1232c 33
20 U.S.C. 1232d 7, 33
20 U.S.C. (Supp. V) 1234 *et seq.* 5
20 U.S.C. (Supp. V) 1234 ..... 2, 9, 34
20 U.S.C. (Supp. V) 1234(d) 11, 19
20 U.S.C. (Supp. V) 1234(e) 36, 37
20 U.S.C. (Supp. V) 1234(f) 9, 36
20 U.S.C. (Supp. V) 1234a(e) 11, 12, 6a
Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. (Supp. V) App. at 399. 31
Occupational Safety and Health Act of 1970, 29 U.S.C. 667(f) 5
Older Americans Act of 1965, 42 U.S.C. (Supp. IV) 3027(d) 5
Omnibus Crime Control and Safe Streets Act of 1968, 20 U.S.C. (Supp. V) 1234 *et seq.* 5
Public Health Service Acts, 42 U.S.C. (& Supp. IV) 246(g)(3) 5
Social Security Act, 42 U.S.C. (& Supp. IV) 301 *et seq.*:
Title V, 42 U.S.C. (Supp. IV) 707 5
Title XVII, 42 U.S.C. 1393(5) 4
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Supplemental Appropriations and Recission Act of 1980, Pub. L. No. 96-304, 94 Stat. 857 30
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20 U.S.C. 241 8
20 U.S.C. 241a *et seq.* 6
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20 U.S.C. 241e(a) 7, 18
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20 U.S.C. 241f(a)(1) 7, 18
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7 C.F.R. 1.52	25
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31 C.F.R. Part 205	7
34 C.F.R.:	
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40 C.F.R. 30.100-30.1150	5
45 C.F.R. (1974):	
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45 C.F.R. 16.1-16.23 5
37 Fed. Reg. 23002 (1972) 9
44 Fed. Reg. (1979):
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Miscellaneous:

Advisory Commission on Intergovernmental Relations, II *Significant Features of Fiscal Federalism, 1976-1977* (1977) 3
R. Cappelli, *Rights and Remedies Under Federal Grants* (1979) 2, 3, 4
R. Catz, *Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement*, 59 Wash. U.L.Q. 1067 (1982) 2, 3, 5
Comptroller General, Gen. Accounting Office, *Disappointing Progress in Improving Systems for Resolving Billions in Audit Findings* (1981) 29
Comptroller General, Gen. Accounting Office, *Federal Agencies Negligent in Collecting Debts Arising From Audits* (1982) 29, 30
Comptroller General, Gen. Accounting Office, *More Effective Action is Needed on Auditors' Findings—Millions Can Be Collected or Saved* (1978) 29
124 Cong. Rec. H20612 (1978) 35
127 Cong. Rec. (daily ed. May 21, 1981):
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p. S5429 ..... 36, 40
128 Cong. Rec. S13260 (daily ed. Oct. 1, 1982) 27
I K. Davis, *Administrative Law Treatise* (2d ed. 1979) 42

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Departments' and Agencies' Continued Failure to Follow up and Resolve Audit Findings: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 97th Cong., 1st Sess. (1981) 29

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Failure to Provide Effective Audits of Federal Grants: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 96th Cong., 1st Sess. (1979) 29

H.R. 4613, 97th Cong., 2d Sess. § 10 (1982) 26

H.R. Rep. No. 93-805, 93d Cong., 2d Sess. (1974) 34

H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. (1978) 9, 35

H.R. Rep. No. 96-279, 96th Cong., 1st Sess. (1979) 29

H.R. Rep. No. 97-727, 97th Cong., 2d Sess. (1982) 20, 30, 31

Improvement of Procedures in Claims Settlement and Government Litigation: Hearings on H.R. 13651 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 28

Mason, *Current Trends in Federal Grant Law—Fiscal Year 1576*, 35 Fed. B.J. 164 (1976) 3

I R. Nash & J. Cibinic, *Federal Procurement Law* (3d ed. 1977) 25

Office of Management and Budget, Circular No. A-50 (rev. Sept. 29, 1982) 20

Office of Management and Budget, *1980 Catalog of Federal Domestic Assistance* (1980) 2

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Office of Management and Budget, *Special Analysis H: Federal Aid to State and Local Governments, reprinted in Special Analysis, Budget of the United States Government Fiscal Year 1979* (1979) 3
S. Rep. No. 1331, 89th Cong., 2d Sess. (1966) 26, 27, 28
S. Rep. No. 91-634, 91st Cong., 2d Sess. (1970) 9, 33
S. Rep. No. 95-1071, 95th Cong., 2d Sess. (1978) .. 31
S. Rep. No. 97-279, 97th Cong., 1st Sess. (1981) 29
S. Rep. No. 97-378, 97th Cong., 2d Sess. (1982) 26
Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 Geo. Wash. L. Rev. 159 (1978) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2125

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 662 F.2d 208. The decisions of the Education Appeal Board (Pet. App. 31a-87a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-28a) was entered on October 13, 1981, and a petition for rehearing was denied on December 17, 1981 (Pet. App. 29a-30a). On March 8, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to April 16, 1982 and, on April 6, 1982, he further extended

the time for filing a petition to and including May 16, 1982. The petition was filed on that date and was granted on October 4, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Claims Collection Act of 1966, 31 U.S.C. 952, the regulations issued thereunder, 4 C.F.R. Parts 101-102, Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. V) 2701 *et seq.*, and the General Education Provisions Act, 20 U.S.C. (Supp. V) 1234 *et seq.*, are reprinted in the Appendix, *infra*, 1a-7a.

STATEMENT

1. This case concerns the authority of federal agencies to recoup unauthorized expenditures under grant-in-aid statutes. Congressionally created grant programs have become a major vehicle for the implementation of fundamental national goals in areas as varied as education, housing, health, transportation, social welfare and environmental protection. Growth in the use of this device has aptly been characterized as "exponential":[1] in 1972, there were 500 federal grant programs; by 1980, 57 federal agencies administered 1123 programs.[2] It has been estimated that by 1979 the federal government was participating in as many as 300,000 grant agreements each year. R. Cappelli, *Rights and Remedies Under Federal Grants* 17 (1979).[3]

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[1] Catz, *Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement*, 59 Wash. U.L.Q. 1067 (1982).

[2] Compare Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 Geo. Wash. L. Rev. 159, 164 n.21 (1978), with Office of Management and Budget, *1980 Catalog of Federal Domestic Assistance* 11 (1980).

[3] In dollar amounts as well, federal grant-in-aid programs have expanded tremendously. In 1937, grant expenditures totalled ap-

While the vast array of assistance programs makes precise definition difficult, all grant programs possess certain common attributes. All grants constitute an award of assistance authorized by statute to meet an express congressionally-recognized need.[4] Thus, the term "federal grant" or "grant-in-aid" is used to apply to any disbursement of monies or property by the federal government to support programs that benefit the public and are carried out by any nonfederal recipient, ranging from a state government to a private individual.[5] Because the purpose of a grant is to implement some congressionally-determined public policy, every grant has express goals and limiting terms and conditions with which each grantee must comply.[6]

Generally, an applicant for a grant must submit a detailed proposal or plan outlining the methods for accomplishing the general goals and purposes of the federal program. In return for the government's providing the grantee with money or property, the grantee must agree, upon the acceptance of the grant, to use it only for the program's legislated objectives, in accordance with the

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proximately $296 million. By 1950, the amount reached approximately $2.2 billion. By 1960, more than $7 billion (or 7.6% of the federal budget) was spent on grant programs. Office of Management and Budget, *Special Analysis H; Federal Aid to State and Local Governments, reprinted in Special Analysis, Budget of the United States Government Fiscal Year 1979*, at 175 (1979); Advisory Commission on Intergovernmental Relations, II *Significant Features of Fiscal Federalism, 1976-1977*, at 55, Table 38 (1977) Report M-110. And in 1981, the total grant outlay was estimated to be more than $125 billion. See Office of Management and Budget, *Special Analysis H: Federal Aid to the State and Local Governments, reprinted in Special Analysis, Budget of the United States Government Fiscal Year 1981*, at 239 (1981); Catz, *supra*, 59 Wash. U.L.Q. at 1069.

[4] Mason, *Current Trends in Federal Grant Law—Fiscal Year 1978*, 35 Fed. B.J. 164, 166 (1976).

[5] See Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. (Supp. IV) 501 *et seq.* and Section 504(1).

[6] Catz, *supra*, 59 Wash. U.L.Q. at 1076.

agency's administrative rules. Cappelli, *supra*, at 47-48 n.4. The characteristic feature of the grant-in-aid funding technique lies in the voluntary acceptance of obligations by otherwise autonomous grantees in exchange for federal money.

Virtually all grant agreements require the grantee to submit to regular agency audits, and to maintain and submit fiscal and program records and reports, to enable the agency to determine whether federal funds have been spent in accordance with the purposes for which they were intended. Cappelli, *supra*, at 47-51. See, *e.g.*, 42 U.S.C. 1393(5). In addition to requirements aimed at ensuring that grant funds are properly spent and accounted for, there are additional "programmatic" conditions with which a grantee must comply. These obviously differ from program to program; several, however, appear with great frequency. One is a "matching" requirement, imposing a duty on the grantee to provide a certain share of total program costs, generally statutorily established. Another is a proscription against the grantee's lowering any fiscal support it has provided for the project before receiving federal funds. Cappelli, *supra*, at 48-49. Unlike the matching conditions, under which the grantee loses only the federal funds it fails to match, maintenance of effort requirements ordinarily must be satisfied by the grantee in order to receive any part of the particular grant. See, *e.g.*, 42 U.S.C. 1397b(c)(1) (Social Security Act).

A salient feature of the grant phenomenon is congressional reliance on the executive branch for implementation. Invariably the congressional policy to be advanced by a particular grant statute is stated in broad general terms, necessarily requiring agency flexibility and experimentation in program implementation and structure. Congress has, almost without exception, delegated to the federal agency administering the grant-in-aid program the broad authority to make all rules and regulations necessary for the effective and efficient accomplishment of the national objectives and purposes set forth in the enabling legislation.

To handle the numerous grant disputes inevitably engendered by the complexity and the size of grant programs, federal agencies have established agency dispute resolution mechanisms.[7] Some grant-enabling statutes themselves expressly provide for notice, adjudicatory hearing and appeal rights.[8] In most grant programs in which Congress has utilized a formula device for distributing funds among the states, it has explicitly provided that the grantee is entitled to a hearing before any noncompliance actions are taken.[9] In addition, many agencies—including almost all of the larger grantors—have established by regulation appeal mechanisms that provide substantial protections for the interests of grantees.[10]

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[7] See, *e.g.*, Department of Health and Human Services grant appeal regulations, 45 C.F.R. 16.1-16.23; Environmental Protection Agency grant appeal regulations, 40 C.F.R. 30.100-30.1150; Department of Labor grant appeal regulations, 20 C.F.R. 676.81-676.93 (1980).

[8] See, *e.g.*, 42 U.S.C. (& Supp. IV) 5301 *et seq.* (Omnibus Crime Control and Safe Streets Act of 1968); 20 U.S.C. (Supp. V) 1234 *et seq.* (General Education Provisions Act, as amended by the Education Amendments of 1978).

[9] See, *e.g.*, 42 U.S.C. (& Supp. IV) 246(g)(3) (Public Health Service Act); 42 U.S.C. 707 (Social Security Act); 42 U.S.C. (Supp. IV) 3027(d) (Older Americans Act of 1965); 16 U.S.C. 1456b(d) (Coastal Zone Management Improvement Act of 1980); 29 U.S.C. 667(f) (Occupational Safety and Health Act of 1970); and 42 U.S.C. (Supp. IV) 7405(e) (Clean Air Act Amendments of 1977).

[10] Grant related administrative appeal and dispute resolution procedures take various forms, ranging from formally established administrative tribunals that make adjudications after evidentary hearings to informal efforts to mediate disputes. Catz, *supra*, at 1127-1129. Several of the larger grantor agencies have developed agency-wide grant appeal boards. These boards are staffed with impartial agency decision-makers and are governed by detailed rules of procedure that, at a minimum, assure development of an adjudicatory record. See, *e.g.*, 45 C.F.R. 16.1-16.23 (Department of Health and Human Services grant appeal board).

2. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. V) 2701 *et seq.*,[11] was enacted to provide federal funding to expand and improve programs "which contribute particularly to meeting the special educational needs of educationally deprived children" in areas where there are high concentrations of children from low-income families. 20 U.S.C. (Supp. V) 2701. Title I funds are thus targeted to a specific group of children—educationally deprived children in low-income areas—and are to be used to address their "special needs" by supplementing their regular school programs. The Secretary of Education (the Secretary) acts through state educational agencies (SEAs) to distribute Title I funds to local educational agencies (LEAs), which provide the supplemental programs. The statutory scheme is carefully constructed to ensure that the funds appropriated are actually expended for the benefit of the targeted group: the school attendance areas and children in those areas meeting specific statutory criteria. 20 U.S.C. 241e; 20 U.S.C. (Supp. V) 2732, 2733, 2736, 2737. Similarly, Title I regulations have been carefully constructed to ensure that only eligible children receive Title I services and that Title I funds are not used to provide general aid to schools or to replace state and local funds that would otherwise have been expended for participating children. See, *e.g.*, 45 C.F.R. 116.17(d),(f),(g),(h) (1974); 34 C.F.R. Part 201.

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[11] Title I has been repeatedly and extensively revised since its original enactment (Pet. App. 2a n.2). The Title I statute and regulations in effect during Fiscal Years 1971-1973, the years in which the funds in issue were misspent, are set forth in 20 U.S.C. 241a *et seq.* and 45 C.F.R. Part 116 (1974). The Title I statute was amended and reorganized in the Education Amendments of 1978 (Pub. L. No. 95-561, 20 U.S.C. (Supp. V) 2701 *et seq.*). Furthermore, as of July 1, 1982, the Title I program was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA) (Pub. L. No. 97-35, 95 Stat. 463). The enactment of the ECIA, however, does not affect the issues involved in this case.

In order to participate in the Title I program, an SEA must assure the Department of Education that Title I funds will be expended only for programs that meet all federal statutory and regulatory requirements and have been approved by the SEA. 20 U.S.C. 241f(a)(1). An LEA may only receive Title I funds from the SEA on the basis of a project application in which the LEA describes how the funds will be expended and provides satisfactory assurances that it will comply with the statutory requirements. See 20 U.S.C. 241e(a). The total amount of funds that an LEA may receive under the Title I program is determined by a formula based on the number of children from low-income families in the area served by the LEA and the state per pupil expenditure. 20 U.S.C. 241c.

By statute, Title I payments may be made either in advance or by reimbursement, with necessary adjustments for overpayments or underpayments (20 U.S.C. 1232d; 20 U.S.C. (Supp. V) 1226a-1, 2841. However, states participating in the Title I program normally receive payment in advance under a letter of credit system.[12] Pursuant thereto, the Department authorizes the SEA to draw Title I funds from the Treasury during the fiscal year, generally not less frequently than monthly, based upon its projections of the cost of providing services for that period. The SEA draws down

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[12] The Department utilizes two types of advance payment systems—"advance by Treasury check" and "letter of credit". The preferred method of payment is the letter of credit system, which is used when certain conditions are met. These conditions relate to the extent of the relationship between the grantee and the Department, the adequacy of the grantee's financial management system and the grantee's "willingness and ability to maintain procedures that minimize the time elapsing between the transfer of funds from the Treasury and their disbursement by the grantee." 34 C.F.R. 74.93(a); see also 31 C.F.R. Part 205. Under both types of advance payment systems, the grantee must minimize the time elapsing between its receipt and disbursement of federal funds. See 34 C.F.R. 74.61(e), 74.92.

its funds under the letter of credit system by submitting payment vouchers through its local commercial bank to a Federal Reserve Bank. The SEA then is able to make Title I payments to LEAs in a similar fashion in advance of actual program expenditures.[13]

In the event an SEA has failed "to comply substantially with any assurance" it was required to give that it would expend funds consistently with statutory requirements, the Department is required to withhold future Title I payments "until [the Secretary] is satisfied that there is no longer any such failure to comply." 20 U.S.C. 241j.

In addition, in order to ensure that Title I funds are being properly expended in accordance with applicable statutory and regulatory requirements, Congress has required the Secretary to conduct post-expenditure audits. 20 U.S.C. 1232c. See also 5 U.S.C. (Supp. V), App. at 378-383; 20 U.S.C. (Supp. V) 2835. If an audit discloses that funds have been misspent, the Department demands restoration of the misspent funds. Demand for repayment is made in accordance with the government-wide Federal Claims Collection Standards (4 C.F.R. 102.2), which provide that if the grantee is unwilling or unable to repay the debt, the amount of the unauthorized payments may be offset against current or prospective grant disbursements. 4 C.F.R. 102.3. The offset remedy is only used, however, if it does not impair the current operation of any federal grant program. See 34 C.F.R. 74.95(a). Audits of Title I programs have been conducted continuously since the late 1960's, and Congress recognized as early as 1970 that misspent Title I funds discovered during these audits must be refunded

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[13] Under the reimbursement payment system, grantees receive payment by check after program expenditures have been incurred. The grantee normally submits to the Department its requests for reimbursements monthly and is paid within 30 days after receipt of a proper request for reimbursement. See 34 C.F.R. 74.96(b).

to the federal government. S. Rep. No. 91-634, 91st Cong., 2d Sess. 83-84 (1970).

In light of the substantial number of Title I audits being conducted by the early 1970's, the Commissioner of Education in the United States Office of Education (now, the Department of Education)[14] administratively established the Title I Audit Hearing Board in 1972 "for the purpose of reviewing and providing hearings upon final audit determinations made in the administration of title I of the Elementary and Secondary Education Act programs by the Office of Education." 37 Fed. Reg. 23002 (1972). The Commissioner explained that the "pendency of a substantial number of audit reports and determinations (some involving relatively large amounts of funds) under title I * * * [made it] necessary and appropriate that a procedure for finally resolving these pending audit matters be established" (*ibid.*).

In the Education Amendments of 1978, Congress mandated the establishment of the Education Appeal Board (EAB) to hear a variety of cases, including state appeals from Title I audit determinations. 20 U.S.C. (Supp. V) 1234. The EAB was intended to "build upon the existing Title I Audit Hearing Board" and expand its jurisdiction to include other federal education programs. H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 141 (1978). The Secretary of Education, pursuant to the specific statutory authority in 20 U.S.C. (Supp. V) 1234(f), accordingly designated the existing Title I Audit Hearing Board to be the EAB and transferred the

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[14] On May 4, 1980, the Department of Education replaced the Office of Education as the federal agency responsible for the Title I program. See 20 U.S.C. (Supp. V) 3411. Consequently, as of that date, the Secretary of Education assumed the responsibilities and authorities that previously were exercised by the Commissioner of Education. See 20 U.S.C. (Supp. V) 3441.

31 pending cases to the EAB. See 44 Fed. Reg. 30528-30537, 43807 (1979).[15]

3. Respondents, the State of New Jersey and the Commonwealth of Pennsylvania, have participated as grantees in the Title I program since its inception in 1965. In the early 1970's the Department of Health, Education, and Welfare Audit Agency (HEWAA) performed separate audits of the state programs for fiscal years 1971-1973 (New Jersey) and 1968-1973 (Pennsylvania). In its final audit reports, issued in 1975, HEWAA found that both States had misapplied substantial sums of federal Title I monies during the periods under investigation (J.A. 14-15 (New Jersey); 59 Pennsylvania)). After soliciting responses from the States, the Deputy Commissioner for Elementary and Secondary Education in the Office of Education[16] issued final determination letters sustaining the audit findings and ordering the States to refund the amounts determined to have been misspent (J.A. 137-143 (New Jersey); 144-165 (Pennsylvania)).

Both states filed applications for review with the Title I Audit Hearing Board (J.A. 166-199 (New Jersey); 200-202 (Pennsylvania)). After extensive administrative hearings, the successor EAB[17] in February 1980 concluded that New Jersey "should make * * * payment [totaling $1,031,304] to the Office of Education" (Pet. App. 57a); in May 1980 it similarly concluded that Pennsylvania should submit payment in the amount of

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[15] The current regulations governing procedures before the EAB are set forth at 34 C.F.R. Part 78.

[16] The Deputy Commissioner for Elementary and Secondary Education was replaced by the Assistant Secretary for Elementary and Secondary Education when the Department of Education was created in 1980 (see note 14, *supra*).

[17] When the EAB replaced the Title I Audit Hearing Board on June 29, 1979, the appeals filed by New Jersey and Pennsylvania were among those over which it assumed jurisdiction (see pages 9-10, *supra*).

$422,424.29 to the Department of Education (*id.* at 86a). The Secretary declined to review the decisions and, accordingly, after the period for comment and review, the Board's decisions became the final decisions of the Department (*id.* at 88a-91a).[18] Each State was informed that appropriate officials "will be in touch with you at an early date to discuss the method of repayment" (*id.* at 88a, 90a).[19]

Respondents thereupon filed separate petitions for review in the United States Court of Appeals for the Third Circuit. See 20 U.S.C. (Supp. V) 1234d, 2851. The States contended, inter alia, that the Secretary lacked both statutory authority and a common law right to recoup administratively illegally expended Title I funds received by a state prior to the Education Amendments of 1978.

The court of appeals agreed; on the basis of a consolidated decision, it granted the petitions and remanded to the agency with instructions to vacate the orders requiring payment (Pet. App. 1a-26a). First, the court found

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[18] The audit findings against New Jersey and Pennsylvania, sustained by the EAB and the Secretary, were based on the States' failure to comply with basic statutory and regulatory requirements critical to the proper operation of Title I programs. New Jersey and Pennsylvania improperly approved LEA applications for the use of Title I funds in school attendance areas that did not contain sufficient percentages or numbers of children from low-income families, in violation of 20 U.S.C. 241e(a)(1)(A) and 45 C.F.R. 116.17(d) (1974) (Pet. App. 31a-87a). In the Pennsylvania case, the Secretary also determined that Title I funds had been expended improperly in two LEAs for general aid purposes, rather than for the special educational needs of eligible educationally deprived children, in violation of 20 U.S.C. 241e(a)(1)(A) and 45 C.F.R. 116.17(g) (1974) (Pet. App. 58a-87a). A violation of either of these two types of requirements defeats the fundamental purpose of the Title I program: to provide special educational services for educationally deprived children in low-income areas.

[19] No such discussions have yet taken place. Recoupment in accordance with the Federal Claims Collection Standards (4 C.F.R. Part 102) has been postponed pending the outcome of this litigation. See 20 U.S.C. (Supp. V) 1234a(e).

(*id.* at 12a-14a) that the Department of Education lacked specific statutory authority to order the repayment of these misspent funds because the only express authorization to recoup was provided in the 1978 Amendments to Title I (20 U.S.C. (Supp. V) 2835(b); see also 20 U.S.C. (Supp. V) 1234a(e)). Relying on the "overarching principle" of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981)—that "the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant"—the court held that the 1978 statute could not be applied to funds misspent prior to its effective date (Pet. App. 14a).

Second, although recognizing that the government may resort to the same common law remedies—including setoffs—as private contractors, the court stated (without deciding the issue) that these remedies may not survive where a statutory remedy is provided (Pet. App. 21a). However, the court concluded, even if such a common law remedy survived here, the "advance-funding" method of distributing Title I money "lends itself to enforcement of that right only by an action in a court of competent jurisdiction" (*ibid.*). The court accordingly distinguished this case from *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976), which upheld the common law right of the Department of Health, Education, and Welfare to recover unauthorized Medicare payments by setoff. The court below explained that the use of a setoff in a reimbursement program such as Medicare would not prejudice the intended beneficiaries of the program, whereas it would have such an effect in an advance-funded program such as Title I, and was therefore proscribed (Pet. App. 21a-22a). Thus, the court concluded, agencies administering advance-funded grants cannot administratively enforce a common law right of setoff, even if such a right exists (*id.* at 24a-25a).

SUMMARY OF ARGUMENT

The federal government has an inherent right to recover monies improperly paid out, and it may exercise that right without resort to a court by offsetting the amount against sums otherwise due to the recipient. This right of recoupment is particularly appropriate in the grant context, because the grantee, like a contracting party, agrees to the terms of the grant as a condition of the receipt of federal funds. If a federal agency determines that the grant terms have not in fact been observed, that condition has not been satisfied, and the grantee has no right to retain the funds. Absent any showing that the administrative procedures by which the agency reached its decision to recoup were unfair or otherwise inadequate, the grantee is entitled only to judicial review of that agency decision to assure that it is not arbitrary or capricious.

The court of appeals nevertheless concluded that the Secretary of Education could not recoup funds administratively determined to have been expended by the respondents inconsistently with the terms of their Title I grants. That conclusion was based in part on concern that an administrative setoff would adversely affect the intended beneficiaries of the Title I program. But that concern overlooks the existence of several available collection methods that protect the rights of the intended beneficiaries. The court's suggestion that audit disputes should be resolved in the first instance in judicial proceedings indicates that it did not intend to absolve respondents of all liability, but that suggestion is impractical in light of the complexity and number of audit disputes.

The inherent right of administrative agencies to recoup misspent grant funds may, of course, be abrogated by express statutory language withdrawing that right. Instead of any such withdrawal, however, Congress has consistently legislated on the assumption that such a right exists; a number of statutes have been enacted to

facilitate and encourage the exercise of that inherent right. The Federal Claims Collection Act of 1966 required the promulgation of government-wide regulatory standards governing administrative efforts to collect claims arising out of agency activities, and those regulations specifically contemplate administrative determinations of liability followed, if necessary, by administrative recoupment. Both in the legislative history of the Claims Collection Act and subsequent to its enactment, Congress has repeatedly expressed its understanding that federal agencies have the authority not only to conduct audits to assure that federal grant funds are expended consistently with the terms on which they are received, but also to determine administratively the amounts due as a result of audit disallowances and to collect those sums by appropriate administrative actions, including offsets.

There is nothing in Title I or its legislative history to suggest that Congress did not intend the Secretary to exercise these general administrative responsibilities. The authority to withhold funds from grantees that are not in compliance with the terms of a grant and to disapprove grant applications that do not conform to statutory and regulatory standards are supplemental to, not inconsistent with, the authority to recover audit disallowances. Congress plainly expected federal agencies to withhold payments for purposes that are known at the time to be unauthorized and to recover payments that are subsequently discovered to have been used for unauthorized purposes. The Education Amendments of 1978 provide expressly for the procedures to be followed in administrative recoupment actions, but those changes were intended to clarify pre-existing authority, not to grant an authority previously denied.

In any event, since the audit disallowances at issue here were pending before the agency when the administrative recoupment authority was expressly confirmed in the 1978 Amendments, the Secretary's subsequent final determinations of liability were authorized by the plain terms of the

1978 Amendments. There is no unfairness to respondents in applying to these pending claims the administrative procedures defined in the 1978 Act. Respondents had no vested rights either to retain funds spent in violation of the conditions under which they were received or to any particular procedure for the determination of their liability. Application of the recoupment procedures spelled out in the 1978 Amendments did not impose on respondents any new responsibilities under their grants that they could not have anticipated when they received those grants. Therefore, there are no requirements included here of the kind this Court found improper in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981). Instead, the Secretary is simply attempting to rectify respondents' failure to comply with the unchallenged terms under which the grants were made.

ARGUMENT

I. THE SECRETARY OF EDUCATION, LIKE THE HEADS OF OTHER AGENCIES ADMINISTERING GRANT-IN-AID PROGRAMS, MAY RECOUP GRANT FUNDS ON THE BASIS OF AN AGENCY ADJUDICATION OF AN AUDIT DISALLOWANCE

A. Federal Agencies Have Inherent Authority to Recoup Improper Expenditures Made by Recipients of Grant-in-Aid Funds Without Resort to Judicial Process

1. This Court has long recognized that the federal government possesses a right to recover monies illegally or erroneously paid out. *United States* v. *Carr*, 132 U.S. 644, 650 (1890); *Wisconsin Cent. R.R.* v. *United States*, 164 U.S. 190, 212 (1896). This right exists independent of statute. See *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Grand Trunk W. Ry.* v. *United States*, 252 U.S. 112, 121 (1920); *United States* v. *Bank of Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841). The mode of exercising this right is also well settled; the United States may enforce its right of recoupment by reasonable means

and without resort to litigation, including by deducting or withholding the amount of the overpayment from other sums due to the recipient. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240 (1947); *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336 (1841); *McKnight* v. *United States*, 98 U.S. 179, 186 (1878); *Wisconsin Cent. R.R.* v. *United States*, *supra*. Setoffs against current or subsequent obligations may be used to prevent a recipient of federal funds from retaining monies that are later found to have been unauthorized by the terms and conditions under which they were received. *Wisconsin Cent. R.R.* v. *United States*, *supra*, 164 U.S. at 211-212. See also *United States* v. *Barlow*, 132 U.S. 271, 281-282 (1889).

The government's common law right of recoupment, and its corollary power of recovery by offset, are based on strong considerations of public policy. All money at the disposal of the government belongs to the public. As custodian of these funds, a federal agency has the fundamental obligation to ensure that federal monies are spent only for those purposes permitted by law. Accordingly, if the public's money has been expended in a manner not authorized by statute, the agency's obligation requires it to take administrative actions necessary to prevent an unjust enrichment by the recipient at the expense of the federal treasury. See *United States* v. *Wurts*, *supra*, 303 U.S. at 415-416; *Grand Trunk W. Ry.* v. *United States*, *supra*, 252 U.S. at 120-121; *Wisconsin Cent. R.R.* v. *United States*, *supra*, 164 U.S. at 210-212.

Moreover, the nature of the federal grant process itself implies the authority to recoup grant-in-aid funds awarded on the condition that they will be spent for specific purposes, when the grantee has failed to abide by that condition. In exchange for federal funds, the grant recipient has voluntarily acquiesced in the obligations and conditions of the grant statute and implementing regulations. *King* v. *Smith*, 392 U.S. 309 (1968); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Harris* v. *McRae*, 448 U.S.

297 (1980). Given the mutuality of obligations assumed, grant-in-aid statutes are considered to be "much in the nature of a contract." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). See also *United States* v. *City of San Francisco*, 310 U.S. 16 (1940); *Burke* v. *Southern Pac. R.R.*, 234 U.S. 669 (1914); *McGee* v. *Mathis*, 71 U.S. (4 Wall.) 143 (1866). Under settled principles of contract law, a contracting party may recover monies paid for services that were contracted for, but either never provided or provided in a manner so substantially inconsistent with the terms of the agreement between the parties that the default results in a failure of consideration. It would be "against conscience" to allow the non-performing party to retain monies advanced to induce his performance. *United States* v. *Barlow*, *supra*, 132 U.S. at 282. See also *United States* v. *Bank of Metropolis*, *supra*, 40 U.S. (15 Pet.) at 383.

The use of grant funds for purposes not authorized by Congress constitutes precisely such a non-performance of the terms of the agreement. To permit the grantee to retain the monies so misspent would be contrary to law and public policy. Absent any showing of unfairness to the grantee, an agency charged with implementing the specified purposes of a grant statute retains the inherent right to recoup misappropriated funds by reasonable means, including administrative setoff against amounts due to the grantee.[20]

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[20] Several federal courts of appeals have recognized the common law right of a federal agency to recoup grant funds by administrative offset, without resort to litigation. See *e.g.*, *West Virginia* v. *Secretary of Education*, 667 F.2d 417 (4th Cir. 1981); *Jacquet* v. *Westerfield*, 569 F.2d 1339, 1342 (5th Cir. 1978); *Collins* v. *Donovan*, 661 F.2d 705, 708 (8th Cir. 1981); *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976); *Wilson Clinic & Hospital, Inc.* v. *Blue Cross*, 494 F.2d 50 (4th Cir. 1974); *Hilburn* v. *Buts*, 463 F.2d 1207, 1208 (5th Cir. 1972), cert. denied, 410 U.S. 942 (1973).

Indeed, in many cases the courts have simply assumed the right and have considered only whether the pre-offset procedures accorded

Application of these principles supports the Secretary's actions in the instant case. Title I of the Elementary and Secondary Education Act of 1965 is designed to promote national educational policies, specifically by providing funding to supplement the regular school programs of educationally deprived children in low-income areas. 20 U.S.C. (Supp. V) 2701. The statutory scheme and the implementing regulations are carefully structured to ensure that Title I funds are not used simply to provide general aid to schools, but rather to provide the precisely defined class of eligible children with services they would not otherwise receive. See 20 U.S.C. (Supp. V) 2732, 2733, 2736, 2737; 34 C.F.R. 201.52, 201.70, 201.71, 201.110.

Prior to obtaining Title I funds, New Jersey and Pennsylvania, like all other grantees, submitted assurances that they would spend the federal award only in accordance with statutory and regulatory requirements. 20 U.S.C. 241f(a)(1), 241e(a), 241c. After an elaborate administrative procedure, the Secretary determined, however, that respondents had improperly used Title I funds for children who resided in ineligible school attendance areas and for general aid purposes instead of for special educational needs of eligible children. Rather than serving educationally deprived children in low-income areas, federal payments thus had been utilized to educate children who are not the intended beneficiaries of the program. While such misexpenditures relieved the States of some of their financial burden in the area of education, that relief was accomplished in contravention of congressional intent and at the expense of the intended beneficiaries of the Title I program and of the public treasury. This type of misexpenditure gives rise to the government's inherent right of recoupment. Accordingly, the Secretary was acting well within his authority when he

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requisite due process protections to the grantee. See, *e.g.*, *Atwater* v. *Roudebush*, 452 F. Supp. 623, 627 (N.D. Ill. 1976), and cases there cited.

demanded repayment of the misspent sums. And, if respondents fail to comply with his demands, the Secretary would be entitled to enforce his recoupment right by offsetting the amounts misspent against current or subsequent Title I payments to the States.

Of course, a grantee has a right to object if the agency's resolution process lacks fundamental fairness, or if the ultimate decision itself is arbitrary and capricious. Here, however, there can be no serious dispute that New Jersey and Pennsylvania were granted an ample opportunity to contest the Secretary's assertion that Title I funds were improperly used.[21] Moreover, grantees are protected from arbitrary administrative decisions, because judicial review of the agency's final adverse action is available in the court of appeals under 20 U.S.C. (Supp. V) 2851 and 20 U.S.C. (Supp. V) 1234d.[22]

2. The court of appeals rejected these principles, in part because of a concern that a setoff of the funds due

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[21] In conducting the audit itself, the Department interviewed appropriate officials from the SEA and the affected LEAs. The States submitted extensive comments on both the proposed and final audit reports (J.A. 35-53 (New Jersey); 127-136 (Pennsylvania). Thereafter, the States appealed the decisions in the final determination letter to the Title I Audit Hearing Board (see page 10, *supra*). Extensive Board proceedings were held in each case, including prehearing conferences, an exchange of written interrogatories (New Jersey), prehearing motions (Pennsylvania)). Thereafter, the States appealed the decisions in the final Pennsylvania case included a four-day evidentiary hearing with 18 witnesses, resulting in a 634-page transcript (*id.* at 59a). New Jersey presented oral arguments but did not request an evidentiary hearing (*id.* at 34a-35a). At the completion of these proceedings, both panels of the successor EAB issued detailed written decisions (*id.* at 31a-57a (New Jersey); *id.* at 58a-87a (Pennsylvania)). Subsequent to the Board's decisions both States submitted additional written comments and recommendations to the Secretary. See 34 C.F.R. 78.82.

[22] Where the grant statute itself does not expressly provide for judicial review, a grantee subject to adverse agency action, including disallowance determinations, is entitled to judicial review under the Administrative Procedure Act, 5 U.S.C. 702.

and the filing of briefs (Pet. App. 32a-34a, 59(a)). The

against future grant payments would adversely affect planned services to eligible children, thus further penalizing the intended beneficiaries of the federal program (Pet. App. 21a-22a). The court apparently did not intend to imply that the States had no liability at all for repayment of the misspent funds, but only to hold that the attempt to collect the funds due by administrative action, rather than by a judicial proceeding, was inappropriate.

a. The court's concern that the method of collection following administrative determination of liability would be inequitable overlooked the alternatives available to the Secretary. Recoupment in advance-funded programs need not penalize the intended beneficiaries of the program. Indeed, Department of Education regulations specifically prohibit any recoupment that would impair the accomplishment of the objectives of the grant program (34 C.F.R. 74.95(a)). Direct repayment of the debt by the grantor out of non-federal funds obviously would not impair the aims of the federal grant program. Furthermore, even if the Secretary must collect the debt by administrative offset, there are several methods available to the Secretary for guarding against such impairment. For example, the state may be required, as a condition of receiving the grant against which the setoff is made, to contribute an equivalent amount of state or local funds to maintain operation of the grant program at mandatory levels. Current program operation would not be adversely affected under this type of offset.[18]

Alternatively, the Secretary could exercise his authority (20 U.S.C. (Supp. V) 1226a-1, 2841) to pay the state by reimbursement of funds expended, and then offset

[18] The Office of Management and Budget has directed agencies to establish controls to assure that the collection of disallowed costs from grantees does not reduce the level of benefits in the federal program. Office of Management and Budget, Circular No. A-50 at 8 (Rev. Sept. 29, 1982).

against funds reimbursed to the grantee.[24] Because the grantee would be receiving reduced payments for program expenditures already incurred, there would, under the court of appeals' analysis, be no reduction in program level under this type of offset.[25]

In sum, while impact on program goals and beneficiaries is a valid consideration in determining the methods of repayment, such determination rests within the broad discretion of the agency, subject to judicial review for arbitrariness. In this case, the Secretary of Education has not yet had the opportunity to exercise that discretion. As the notice letter to each State indicated (Pet. App. 88a, 90a), the "method of repayment of the funds in question" remains to be determined after judicial review is completed and the amount of the State's liability established. See also note 19, *supra*. At this stage of the proceedings, therefore, it was inappropriate for the court to assume that the collection of the overpayments would be inconsistent with the statutory purposes of Title I.

b. The court of appeals' suggestion (Pet. App. 23a-25a) that the Secretary might collect misspent funds by suit in federal court indicates that it did not intend to deny the States' liability altogether. But requiring the

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[24] Recoupment could also be made by offset against reimbursements to the state under other federal grant programs. See 4 C.F.R. 102.3.

[25] The court below specifically found that because Medicare is a reimbursement-funded program, offsets under that program would not reduce current program levels and presumably would therefore be permissible. Although "advance" and "reimbursement" funding are theoretically distinct, the practical differences between the two may not be significant. Actual payments under both Medicare and Title I are disbursed in similar fashion—at periodic intervals, generally monthly, throughout the fiscal year—and payments may be withheld at any time during the year for good cause. See pages 7-8, *supra*; *Mt. Sinai Hospital* v. *Weinberger*, *supra*, 517 F.2d at 335. It is thus not at all clear that the effects of recoupment differ in the two circumstances.

government to bring an original action in federal court to recover every audit-related misexpenditure only theoretically protects the Secretary's right of recovery. Such an alternative remedy is neither adequate nor feasible. Not only would it effectively nullify the right from the federal government's standpoint, but it would also seriously erode already strained judicial resources.

Given the vast size of the federal grant effort—both in numbers of programs and administering agencies and in the amount of expenditures—and the fact that most grant statutes contain no express recoupment authorization (see pages 2-5, *supra*), the sheer volume of potential collection suits would, as a practical matter, ensure that only the largest cases would ever result in litigation. Cognizant of this practical reality, grant recipients would be encouraged to resist repayment, thereby postponing the need to repay the amount in dispute and frequently avoiding the need to repay entirely.[26] The end result would be an undermining of the fundamental principle that federal grant funds must be spent according to the conditions of the grant.

In an original action brought by the federal government to recover an audit disallowance, each side would be required to introduce documentary evidence for adjudication by the district court, thereby duplicating the administrative proceedings.[27] The courts would be required to adjudicate de novo complex and often hotly contested agency audit disallowance determinations. These burdens can be avoided by recognizing that the administrative agency charged with implementing the grant pro-

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[26] This windfall to grant recipients, of course, would be at the expense of the aims Congress sought to accomplish in appropriating the monies for the grant program.

[27] The likely result of stripping federal agencies of their administrative enforcement power would be the dismantling of the elaborate dispute resolution mechanisms and appeals boards currently in place, on the ground that they had become futile, and a waste of federal funds and manpower.

grams, and particularly a specially constituted appeals board with expertise in the highly technical audit matters likely to be in issue, is the appropriate forum in which to resolve these disputes in the first instance.

Once audit disallowance disputes have been resolved through an administrative review process, administered by officials with expertise in the substantive matters in dispute, there is an administrative record and a statement of reasons. A grantee aggrieved by the final agency determination may then appeal to federal court, and judicial review can be based on the administrative record that has resulted in sharpening the issues.[28] Agency action can be overturned if the record reveals it was arbitrary or capricious or lacking a rational basis.

In sum, the remedy of administrative recoupment is firmly established as an inherent common law right of the government, and the administrative adjudication upon which it is based enhances and further facilitates judicial review while working no unfairness on grantees.

B. Congress Has Affirmed The Right of Administrative Recoupment

The government's inherent right to recover federal funds from one who has no right to retain them is not barred unless and until Congress has " 'clearly manifested its intention' to raise a statutory barrier." *United States* v. *Wurts*, 303 U.S. 414, 416 (1938), *quoting Grand Trunk W. Ry., supra*, 252 U.S. at 121. See also *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952).[29] Indeed, the conclusion that the sovereign has

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[28] The absence of a statement of reasons has been found to hamper judicial review. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417 (1971).

[29] Even where such an intention is explicit, the scope of the common law will be constrained no further than the fair import of the statute's language requires. *United States* v. *Mead*, 426 F.2d 118, 123 (9th Cir. 1970); *United States* v. *Borin*, 209 F.2d 145 (5th Cir.), cert. denied, 348 U.S. 821 (1954).

been denied rights that it could otherwise properly claim will only be "warranted if exacted by the most express language, or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).[30] The absence of express administrative recoupment authority in a grant statute (as in Title I before the 1978 Amendments) is not such an unequivocal expression of congressional intent. Cf. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). On the contrary, the lack of express authority in the individual grant statute is more likely to reflect the view of Congress that it was unnecessary to confirm the agency's well-settled power of recoupment.

1. The Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.*, is strong evidence of congressional belief in the existence of such authority, and is itself sufficient to grant the right of recoupment, if an express statutory provision is necessary.[31] Section 3(a) of the Act (31 U.S.C. 952(a)) provides:

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[30] This is particularly the case where, as here, no express statutory authority is required to support the right in the first place. See *Jacquet* v. *Westerfield*, *supra*, 569 F.2d at 1342.

[31] The lower courts have consistently held that the Federal Claims Collection Act provides explicit authority for administrative offset procedures. In many of these cases, the courts have also held that the Act merely embodies common law rights and principles. *American Federation of Government Employees* v. *Nimmo*, 536 F. Supp. 707, 713 (E.D. Va. 1982) (authority of the Veterans Administration to recoup the costs of non-service connected medical care furnished to ineligible veterans); *Collins* v. *Donovan*, 661 F.2d 705, 707 (8th Cir. 1981) (authority of the Secretary of Labor to recoup overpayment of Trade Readjustment Allowance benefits made pursuant to the Trade Act of 1974); *Atwater* v. *Roudebush*, 452 F. Supp. 622, 627 (N.D. Ill. 1976) (Federal Home Administration and Veterans Administration setoffs); *Louisiana* v. *Block*, 531 F.Supp. 118, 122 (M.D. La. 1982) (reduction of state food stamp grants by means of setoff).

> The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

As required by the Act, government-wide regulations have been promulgated jointly by the Attorney General and the Comptroller General.[32] 4 C.F.R. Parts 101-105 (1980) ("Federal Claims Collection Standards").[33] These regulations provide, inter alia (4 C.F.R. 102.1):

> The head of an agency or his designees shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of * * * his agency in accordance with the standards set forth in this chapter.

These mandatory "aggressive" and "timely" agency actions to collect debts expressly include making "written demands * * * upon a debtor" and instituting an "offset * * * in every instance in which this is feasible." 4 C.F.R. 102.2, 102.3.[34] The Department of Education's final dis-

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[32] The Comptroller General is the head of the General Accounting Office (GAO), which was established by Section 301 of the Budget and Accounting Act of 1921 (31 U.S.C. 41), and is independent of the executive departments. It is part of the legislative branch of the Government. I R. Nash & J. Cibinic, *Federal Procurement Law* 19 (3d ed. 1977).

[33] Many agencies, including the Department of Education, have promulgated regulations adopting and supplementing the Federal Claims Collection Act standards. See, *e.g.*, 34 C.F.R. Part 30 (Department of Education); 45 C.F.R. Part 30 (Department of Health and Human Services); 7 C.F.R. 1.52 (Department of Agriculture); 29 C.F.R. 2.6 (Department of Labor).

[34] These regulations are well within the broad authority granted to the Attorney General and the Comptroller General under 31 U.S.C. 952(a) and are consistent with the Federal Claims Collection Act. Moreover, the long established principle that courts should give great

allowance determinations in the instant cases constitute claims of the United States arising out of the activities of the Department of Education. Moreover, offset is "feasible" here because respondents annually receive substantial sums of grant money, well in excess of the misexpended amounts, pursuant to the Title I program. The plain language of the Act and implementing regulations thus authorize, and indeed require, administrative recoupment of the funds disallowed once they have been administratively determined to have been misspent. Specifically, the regulations require a demand for repayment and, where this is unsuccessful, the use of other reasonable administrative methods, such as offsets. Agencies are not expected to litigate all audit disallowance claims—indeed, it is absurd to suggest that Congress intended to require agencies to overpay grantees while simultaneously bringing suit for the amount of the overpayment; rather, agencies are to utilize appropriate administrative collection procedures.[35]

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deference to interpretations of a statute by the agency charged with its implementation is entitled to particular weight here. The Federal Claims Collection Act was in essence an adoption by Congress of a recommendation submitted to that body by the Attorney General (S. Rep. No. 1331, 89th Cong., 2d Sess. 8-9 (1966)). As the moving force behind the Act, the Attorney General can be deemed to be fully aware of its purposes and to have included nothing in his implementing regulations inconsistent therewith.

[35] Congress has recently enacted the Debt Collection Act of 1982 (Pub. L. No. 97-365, 96 Stat. 1749) to facilitate government collection of debts owed by private persons—primarily defaults on government loans. S. Rep. No. 97-378, 97th Cong., 2d Sess. 1, 24, 32-33 (1982). Section 10 of that Act (H.R. 4613, 97th Cong., 2d Sess. § 10 (1982)) adds a new Section 5 to the Federal Claims Collection Act, specifically providing that an agency head "may, after attempting to collect a claim from a person under section 3a of this Act [31 U.S.C. 952(a)] collect the claim by means of an administrative offset" if it has been outstanding for 10 years or less and if the person is provided specified procedural protections. Subsection (e) of the new Section 5 provides that, for the purposes of the new Section, "the term 'person' does not include any agency of the United States, or any State or local government." Senator

The legislative history of the Federal Claims Collection Act clearly demonstrates that Congress assumed the existence of agency authority to determine administratively the existence and extent of "claims of the United States for money or property arising out of [agency] activities" (31 U.S.C. 952(a)). The bill proposed by the Department of Justice and adopted by Congress was designed "to ease court congestion and improve and accelerate the disposition of Government claims," primarily by expanding agency authority to settle such claims. See Letter from Attorney General to the Vice President (Mar. 10, 1966) transmitting proposed legislation, *reprinted in* S. Rep. No. 1331, 89th Cong., 2d Sess. 8-9 (1966). At that time, most agencies were expressly precluded by existing law from settling claims for less than their full amount or terminating efforts to collect claims; all claims that could not be successfully collected administratively were thus referred to the Department of Justice for litigation.[36]

The new Act recognized and reaffirmed the series of steps by which the United States had previously attempted

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Percy, its sponsor, explained that subsection (e) was intended to recognize that only *individuals* are entitled to the due process protections provided the debtor in the new Section 5 (128 Cong. Rec. S13260 (daily ed. Oct. 1, 1982)). See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323, 324 (1966). This reading of the Debt Collection Act of 1982 is consistent with its major purpose, to improve the effectiveness of the government's efforts to recover overdue loans made to individuals. The Act does not speak to the situation with which this case deals.

[36] Congress recognized that administrative determinations of the amounts due, and efforts to collect those amounts, normally precede litigation. In justifying the need for additional authority to terminate or suspend collection efforts on small claims, the Senate Report indicated that "agency collection efforts before referral will reveal that in numerous cases the debtor, at no time, could have paid the debt. * * * [In other cases] if the debt cannot be collected by agency action or for other reasons, the agency c[an] still refer the debt, as it does today, to either the GAO or the Department of Justice." S. Rep. No. 1331, *supra*, at 3-4.

to collect debts—beginning with agency demand for repayment and employment of offsets where feasible. If these administrative efforts proved unsuccessful, referral to the Justice Department for possible litigation could still be made under the Act. Litigation, however, was only to be used as "a last resort," after exhaustion of administrative collection procedures. S. Rep. No. 1331, *supra*, at 3. In the case of certain small claims not exceeding $20,000, the agency was no longer required to pursue collection but could enter into a compromise or settlement agreement when, on balance, it would serve the interests of the United States.

The legislative history makes clear that the administrative authority to recoup and offset (as provided in 31 U.S.C. 952(a)), in contrast to the authority to settle and compromise (as provided in 31 U.S.C. 952(b)), predated passage of the Act. Indeed, various restrictions on agency authority to compromise were included precisely because the newly created compromise authority was in derogation of the agency's duty to make serious efforts to collect all claims and, without express limits, might be exercised too freely with resulting loss of federal revenues. Caution was thus required at the outset of this new experiment. *Improvement of Procedures in Claims Settlement and Government Litigation: Hearings on H.R. 13651 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 23-24 (1966) (statement of Assistant Attorney General John W. Douglas). See also *id.* at 26-28 (exchange between Mr. Douglas and Representatives Grider and Ashmore).

2. On several occasions since passage of the Federal Claims Collection Act, Congress has reaffirmed the duty of all federal agencies to pursue their audit-related collection responsibilities aggressively. Indeed, in light of mounting evidence of substantial audit-related debts owed by grantees (primarily state and local governments), Congress has recently expressed great concern about deficiencies in agency efforts to collect these audit disallowances and has sought ways to improve the quality and effectiveness of

administrative collection procedures. Congressional views are best summarized in a recent report by the House Committee on Government Operations. H.R. Rep. No. 97-727, 97th Cong., 2d Sess. (1982) ("Cong. Report") entitled "Failure of Federal Departments and Agencies to Collect Audit-Related Debts". The Report—the third in a series of related reports beginning in 1979 [37]—criticizes several agencies for their failure to act promptly and aggressively to recover amounts due the government as a result of audit findings (*id.* at 2).[38]

In the Report, the Committee stressed its "long recogni-[tion]" of the importance of effective audit resolution (Cong. Report at 2) and its concern over huge unresolved

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[37] The others are *Failure of Government Departments and Agencies to Follow Up and Resolve Audit Findings*, H.R. Rep. No. 96-279, 96th Cong., 1st Sess. (1979), and *Continued Failure of Departments and Agencies to Take Effective Action on Audit Findings*, H.R. Rep. No. 97-279, 97th Cong., 1st Sess. (1981). These reports urged federal agencies to strengthen their audit resolution systems to ensure that debts are effectively and promptly accounted for and collected.

[38] The Report is based both on hearings and a GAO report: *Departments' and Agencies' Continued Failure to Follow up and Resolve Audit Findings: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 97th Cong., 1st Sess. (1981); Comptroller General, General Accounting Office, *Federal Agencies Negligent in Collecting Debts Arising From Audits* (1982) ("GAO Report").

The 1979 and 1981 House Reports (see note 37, *supra*) were similarly based on hearings and GAO reports. See *Failure of Departments and Agencies to Follow Up on Audit Findings: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong., 1st Sess. (1979); *Failure to Provide Effective Audits of Federal Grants: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong., 1st Sess. (1979); Comptroller General, General Accounting Office, *More Effective Action is Needed on Auditors' Findings—Millions Can Be Collected or Saved* (1978); Comptroller General, General Accounting Office, *Disappointing Progress in Improving Systems For Resolving Billions in Audit Findings* (1981).

audit disallowances "in the billions" (*id.* at 7),[39] and reiterated that agencies have "primary responsibility" for effective resolution of such disallowances—which necessarily includes the duty to collect amounts finally found to be due (*id.* at 15). Among the statutory sources of agency authority to recover misspent grant or contract funds, the Committee highlighted the Federal Claims Collection Act, noting that the regulations promulgated thereunder "have the force and effect of law * * * [and] require agencies to take aggressive action to collect amounts due, when feasible, by offsetting future payments to the debtor." *Id.* at 6.[40]

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[39] The GAO Report stated (at 6, 24) that on the basis of an agency survey, as of June 30, 1981, a "grossly understated" estimate of outstanding audit-related debts or amounts misspent by grantees or contractors was $374 million. The report emphasized (at 2) that the grantees involved "are typically State or local government entities or community-based organizations."

[40] The Committee recognized that the Federal Claims Collection Act does not stand alone as statutory support for the right to recoup misspent funds administratively. Even prior to that Act, the Accounting and Auditing Act of 1950 (31 U.S.C. 66a) required the head of each executive agency to establish and maintain systems of accounting and internal controls. See Cong. Report at 6; GAO Report at 3-4. Virtually all agencies administering grant statutes are similarly required to perform audits to ensure that monies are properly expended. See page 4, *supra*. Because the recovery and collection of disallowed costs is but the "final link in the audit resolution chain" (Cong. Report at 5), the right of administrative recoupment has been statutorily authorized for at least as long as agency audits and accounting systems have been required.

More recent expressions of this congressional policy can be found in the Supplemental Appropriations and Rescission Act of 1980 (Pub. L. No. 96-304, 94 Stat. 857), directing agencies for which appropriations are being made to initiate action promptly on all audit findings, and in the Department of Housing and Urban Development-Independent Agencies Appropriation Act of 1981 (Pub. L. No. 96-526, 94 Stat. 3066), requiring agencies to take immediate action to "improve the collection of overdue debts * * * [and] to bill interest on delinquent debts as required by the Federal Claims Collection Standards." In addition, Congress has created offices of Inspector and Auditor General in 13 executive departments and

The Committee blamed administrative failure to collect a significant portion of audit-related debts, in part, on agency violations of the Federal Claims Collection Act. Accordingly, the Committee recommended, inter alia, that "[a]ll claims arising from audit disallowances be collected in accordance with the Federal Claims Collection standards" (Cong. Report at 15, recomm. 5) and that "[a]ny claims involving funds spent in violation of law or ongoing regulations be automatically disallowed. Agencies should not be allowed to waive recovery of any such funds without express legislative direction" (*ibid.*, recomm. 3). Finding that "legitimate grantee appeals were being used to delay payment of grantee debts at a cost of millions of dollars to the Federal Government," the Committee also recommended that agencies charge and collect interest on all audit-related debts (*id.* at 15, recomm. 7).

C. Nothing In Title I Itself Suggests A Congressional Intent To Abrogate The Secretary's Right To Recoup Grant Funds On The Basis Of An Administrative Determination That They Have Been Misspent

1. Respondents argued below that "by providing for the withholding of funds and disapproval of SEA applications, Congress intended to abrogate whatever common-law causes of action the Department may have had" to make administrative recoupments (Pet. App. 20a). But the specification of these methods of assuring compliance with statutory standards falls far short of the explicit statement of congressional intent necessary to deprive the Secretary of his right to recover improperly spent public

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agencies for the purpose of consolidating existing auditing and investigative resources to combat fraud, waste, and abuse in federal expenditures and programs. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. (Supp. V) App at 399. In support of that Act, Congress noted that "internal auditors nearly always pay their own way many times over by performing audit work that leads to recovery of overpayments from grantees and contractors * * *" S. Rep. No. 95-1071, 95th Cong., 2d Sess. 10, (1978).

funds (see pages 23-24, *supra*). Cf. *Rosado* v. *Wyman*, 397 U.S. 397, 422-423 (1970). In any event, neither the Secretary's power to withhold future funding from a noncomplying grantee (20 U.S.C. 241j) nor his obligation to disapprove grant applications that do not meet statutory requirements (20 U.S.C. 241f(b)) is in any way inconsistent with, or duplicative of, his right to recover funds that have been squandered, in violation of statutory requirements, in the past.

The withholding and disapproval remedies are designed to assure that funds are not allocated to the states under circumstances that indicate they will be misspent. But those remedies only address the situation in which the grantees are seeking the allocation of funds for noncomplying programs. The recoupment remedy, on the other hand, applies to noncompliance discovered *after* the federal moneys have been expended. The two types of remedies are thus entirely complementary: the first prevents payments for improper purposes, while the second permits recovery of sums improperly applied.[41]

2. Nor can congressional actions in amending Title I to include an express requirement that the Secretary recoup funds "finally determined * * * to have been misspent or misapplied" (Section 185(b) of Title I (20 U.S.C. (Supp. V) 2835(b)) be construed as indicating that Congress viewed the agency as lacking prior authority. To the contrary, the pre-1978 Title I statute clearly implies that the Secretary retained the common law right of recoupment; the 1978 Amendments simply provide an explicit procedural framework for the administrative enforcement of rights otherwise implicitly held.

a. The pre-1978 Title I statute authorized the Secretary to conduct audits of state programs to determine whether there had been overpayments or underpayments and to make necessary adjustments in future grant

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[41] Agency recoupment authority under grant statutes with similar explicit enforcement provisions has been sustained. See, *e.g.*, *Mt. Sinai Hospital* v. *Weinberger*, *supra*; *United States* v. *Bellard*, 674 F.2d 330 (5th Cir. 1982); *Jacquet* v. *Westerfield*, *supra*.

awards. 20 U.S.C. 1232c, 1232d.[42] The legislative history demonstrates that this audit authority was meant to include the authority to recover any funds determined to have been misspent as a result of the audits. S. Rep. No. 91-634, 91st Cong., 2d Sess. 83-84 (1970) states:[43]

> Audit reports on title I * * * have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to be well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer.

Additionally, in enacting a five-year statute of limitations in 1974 (20 U.S.C. 884), Congress reiterated its

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[42] The court below stated (Pet. App. 15a) that the Secretary's actions in ordering respondents to repay misspent Title I funds were "very much different" than the offset authority in 20 U.S.C. 1232d. We disagree. If the Secretary has the statutory authority to collect misspent Title I funds by an adjustment in future payments, he certainly can first demand repayment of those funds. See 4 C.F.R. 102.2 (1980).

[43] There is some confusion over whether this piece of legislative history relates to Section 434 (20 U.S.C. 1232c) or Section 435 (20 U.S.C. 1232d) of the General Education Provisions Act. While the text refers to Section 425, 20 U.S.C. (1970 ed.) 1232c (which was renumbered as Section 415 two years later), the court below concluded that this was a typographical error and that the passage was intended to explain Section 424, 20 U.S.C. (1970 ed.) 1232d (Pet. App. 15a-16a). But whichever section is being explicated, the statement itself clearly demonstrates that Congress intended and expected the agency to conduct audits and to recover any misspent Title I funds.

Congress recently has again recognized that agency authority to conduct audits includes the parallel authority to recoup on the basis of administrative adjudication of audit disallowances. See note 40, *supra*.

intent that the agency recover funds improperly expended under Title I. Section 884 provides that "(n)o State or local education agency *shall be liable to refund any payment* * * * if such payment was made more than five years before such agency received final written notice that such payment was unauthorized" (emphasis added). There would have been no need for a statute of limitations unless the agency had the authority to recover misspent funds based on audits of past expenditures. Moreover, the reference in the statute to "refunds" indicates that Congress evidently intended and anticipated that the Secretary would exercise his authority to collect administratively audit disallowances not barred by the statute of limitations.[44]

b. Express statutory authority for administrative recoupment of misspent Title I funds was added by the Education Amendments of 1978. But the fact that Congress grants a power expressly does not negate the existence of the power prior to the express grant. Cf. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). In any event, the legislative history of the 1978 Amendments clearly demonstrates that, rather than creating any new remedy, Congress merely intended to formalize and make certain changes in the already existing administrative mechanism for the recovery of misspent Title I funds. Thus, the 1978 Amendments mandate the establishment of the Education Appeal Board (EAB) with jurisdiction to hear state appeals from Title I audit determinations (20 U.S.C. (Supp. V) 1234). Congress indicated awareness and approval of the predecessor Title I Audit Hearing Board's exercise of this jurisdiction. See,

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[44] The legislative history of 20 U.S.C. 884 shows that Congress was aware of the agency's audit resolution and collection activities. The House Report describes the audit procedures in detail and explains that the agency may not "collect" on an audit exception if final notice of the intention to "collect" is made more than five years after the date of the unauthorized expenditure. H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 78-79 (1974).

e.g., 124 Cong. Rec. H20612 (1978) (remarks of Rep. Corrada):

> [T]he title I, ESEA statute and regulations currently provide for * * * the repayment of misspent funds after an audit or review has been conducted * * *.
>
> The repayment authority following an audit has been used in the last couple of years on a number of occasions, and has been an effective measure to insure some accountability in the title I programs. In the past 2 years, approximately 30 audit determinations have been appealed to the title I Audit Hearing Board, an internal, impartial hearing board to resolve audit determinations disputes between the Office of Education and State educational agencies. Approximately one-third of these cases have reached final resolution and have required repayment.

The House Report accompanying the 1978 Amendments also makes clear that Congress did not believe it was enlarging the pre-existing right of the Secretary to recover misspent Title I funds through an administrative hearing process. Instead, Congress intended simply to clarify and formalize the authority that it viewed the Secretary as already possessing (H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 142 (1978)):

> [N]othing in these provisions [establishing the EAB] should be interpreted as radically changing the present relationship of the Federal Government to the States or to local school districts. These amendments, rather, are meant merely to lay out responsibilities more clearly so that no confusion exists about each governmental levels' respective duties.[45]

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[45] In addition, the House Report states that the new EAB was designed "to build upon the existing Title I Audit Hearing Board" and to expand its jurisdiction to include other federal education programs (*id.* at 141). There is no suggestion that Congress felt that the Title I Audit Hearing Board did not have the power to

Thus, the amendments and their legislative history indicate that Congress assumed that the Department of Education had always had the authority to recoup misspent Title I monies administratively and that Congress approved the remedy. This congressional understanding is entitled to great weight. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-381 (1969).[46]

II. THE ADMINISTRATIVE RECOUPMENT HERE WAS SPECIFICALLY AUTHORIZED BY TITLE I

While the audit disallowance protests in this case were pending, Congress enacted the Education Amendments of 1978. There is no dispute that in that Act Congress explicitly authorized the Secretary to recover administratively all Title I funds that have been finally determined through the audit resolution process to have been misspent by a grantee (20 U.S.C. (Supp. V) 2835(b); 20 U.S.C. (Supp. V) 1234a(e)).[47] These sections are applicable to the

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issue binding decisions in the cases within their original jurisdiction. Indeed, the specific authorization in 20 U.S.C. (Supp. V) 1234(f) of the designation of an existing appeal board to be the EAB obviously contemplates the transfer of pending cases from the existing board, and thus necessarily assumes such jurisdiction.

[46] In 1981, the Senate considered an amendment to an appropriations bill that would have relieved the states of any obligation to repay Title I funds that were misspent before 1978. Although the amendment was ultimately defeated on a point of order (127 Cong. Rec. S5429 (daily ed. May 21, 1981)), the debate further confirmed congressional recognition of the Secretary's pre-1978 exercise of his recoupment authority (*id.* at S5427 (remarks of Sen. DeConcini)). Indeed, one of the objections to the proposed amendment was that the 1978 cutoff date would unfairly "penalize[] those States [like New Jersey] * * * which have in good faith paid back claims and reward[] those States which have delayed" (*id.* at S5428, S5429) (remarks of Sen. Schmitt).).

[47] Section 185(b) of Title I (20 U.S.C. (Supp. V) 2835(b)) provides:

> (b) Audit resolution and repayment.—The Secretary shall adopt procedures to assure timely and appropriate resolution

instant case. Thus, even assuming lack of authority derived elsewhere, the Title I statute has explicitly contained authority to recoup misspent Title I funds administratively since the 1978 Amendments, substantially before the completion of the administrative appeal processes here at issue.

Contrary to the conclusion of the court of appeals, reliance on the authority contained in the 1978 Amendments does not involve any unfair retroactive application of the law.[48] Compare *West Virginia* v. *Secretary of Education*, *supra*, 667 F.2d at 419. It is well established that a federal court or administrative agency must "apply the law in effect at the time it renders its decision, unless

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of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

20 U.S.C. (Supp. V) 1234a(e)) provides:

A final audit determination by the Secretary under subsection (a) of this section with respect to which review has not been requested pursuant to subsection (b) of this section, or a fin[illegible] decision of the Board under this section upholding a final audit determination against a State or a local educational agency shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with the Federal Claims Collection Act of 1966.

[48] Indeed, the court properly based its own jurisdiction on related provisions of the 1978 Amendments (Pet. App. 10a n.12).

doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). See also *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801).[49] Nothing in the statute itself or in its legislative history suggests that the 1978 recoupment legislation was not intended to apply to pending cases.[50] Accordingly, the relevant inquiry is thus narrowed to whether application of the procedures spelled out in the 1978 Amendments to pending cases would result in a manifest injustice.

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[49] The court of appeals' reliance (Pet. App. 1a-12a) on *Greene* v. *United States*, 376 U.S. 149 (1964), is misplaced. In *Greene*, a Department of the Navy employee brought an action for lost wages. After a favorable administrative determination and while litigation was still pending, the administrative procedures for reimbursement were changed. This Court refused to apply these new, more restrictive procedures for obtaining remuneration to a claimant who had already obtained a final favorable administrative determination under the old procedures. *Id.* at 161. In contrast to Greene's established administrative right to reimbursement, respondents here had no administratively determined right to Title I funds when the new law became effective.

Furthermore, the parties claiming hardship in this case are not individuals, but government entities. Under these circumstances, this Court has been less likely to find an injury justifying an exception to the general rule in favor of applying new law to pending cases. See *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 717-719.

Finally, unlike the administrative procedures involved in *Greene*, the Title I amendments reflect congressionally determined national policies. In matters of "great national concerns * * * the court must decide according to existing laws." *United States* v. *Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110. See also *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 719.

[50] Indeed, as discussed above (see pages 34-36, *supra*), the legislative history rather conclusively shows that Congress intended simply to clarify pre-existing recoupment authority; it thus evidently expected the new provision to be applied to all currently pending disputes. See *West Virginia* v. *Secretary of Education*, *supra*, 667 F.2d at 419.

It would not. Application of the 1978 recoupment provisions would neither impair antecedent, vested rights of respondents nor impose new substantive obligations on them; hence, respondents cannot reasonably claim unfairness or hardship. See *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 720. The only relevant right that existed prior to 1978 is that of the public to have its money spent for authorized purposes in the national interest. Application of the 1978 recoupment provisions to this case serves not to impair, but to vindicate, this right.

Even assuming, contrary to our primary submission, that there was no right to an *administrative* recoupment before the 1978 Amendments, the only effect of the new procedure was merely to change the appropriate tribunal for litigating Title I audit claims from a court of competent jurisdiction to an administrative proceeding before the EAB, with judicial review in the appropriate court of appeals.[51] Even in that case, no antecedent rights of grantees are implicated. Respondents did not have a vested right to any particular procedure for resolving Title I audit disputes.[52] And they certainly did not have

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[51] The court of appeals found it unnecessary to decide whether there was a right of judicial recoupment before the 1978 Amendments (Pet. App. 19a-23a). It is not entirely clear whether respondents claim an absolute right to retain misspent pre-1978 Title I funds (compare Pa. Br. in Opp. 12 with 16-17; N.J. Br. in Opp. 7-8 with 9-10). In any event, the inequity of precluding any method of recovering misspent funds and the existence of audit requirements in the Title I program (see pages 8-9, *supra*) at least show that Congress expected that grantees would be answerable in some forum for violations of the explicit statutory conditions of the grant. See also *Rosado* v. *Wyman*, *supra*, 397 U.S. at 422-423.

[52] Simply changing the tribunal authorized to hear a particular type of case is a remedial or procedural change. *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916); *Montana Power Co.* v. *FPC*, 445 F.2d 739, 747 (D.C.Cir. 1970), cert. denied, 400 U.S. 1013 (1971); *Pennsylvania Power & Light Co.* v. *FPC*, 139 F.2d 445, 453 (3d Cir.), cert. denied, 321 U.S. 798 (1943). It is generally recognized

a vested right to misspend Title I funds. Grants under Title I are limited to particular purposes; states have always received the grants subject to conditions on the use of the funds as specified by the Secretary, acting in accordance with the requirements imposed by the authorizing legislation.

Nor have any unanticipated substantive obligations or increased burdens been imposed on grantees. The 1978 Amendments do not alter the grantees' responsibility to expend Title I grants only in consonance with expressly stated statutory and regulatory conditions, of which they were aware prior to receipt of the funds. Indeed, although New Jersey apparently claims that it was unaware that it might be required to repay improperly expended Title I funds before the 1978 Amendments were enacted (Br. in Opp. 9-10), in fact New Jersey, as well as 25 other states and the District of Columbia, paid back misspent Title I funds prior to 1978 (127 Cong. Rec. S5428-5429 (daily ed. May 21, 1981)).[53] Those repayments strongly suggest that the states generally, and New Jersey in particular, understood clearly the conditions under which they received the Title I grants and their

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that "statutory changes that are procedural or remedial in nature apply retroactively." *United States* v. *Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); see *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 93-94 (D.C.Cir. 1980); *Koger* v. *Ball*, 497 F.2d 702, 706 (4th Cir. 1974); *United States* v. *Haughton*, 413 F.2d 736, 738 (9th Cir. 1969). The rationale for this rule is that retroactive changes in enforcement methods, in contrast to retroactive changes in principles of liability, do not transform a legal act into an illegal act or otherwise alter the legal expectations upon which a party based his prior conduct. Thus, the potential for unfairness in retroactive application of procedures or remedies is small. Cf. *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977), quoting *Beazell* v. *Ohio*, 269 U.S. 167, 171 (1925) (Ex Post Facto Clause does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance").

[53] The Department of Education informs us that some of these repayments were made after 1978. New Jersey has made repayments both before and after 1978.

obligation to return funds not expended in accordance with those conditions.

Nothing in this Court's decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is inconsistent with our submission here. In *Pennhurst*, the Court concluded that 42 U.S.C. 6010 does not provide the mentally retarded with a right to treatment in the least restrictive environment. The Court found that the language of Section 6010 was too ambiguous to be read as imposing additional affirmative financial obligations on states receiving grant-in-aid funds under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* (451 U.S. at 25). There is no claim here that respondents were unaware, when they received the relevant Title I grants, of the substantive conditions that the audits disclosed had been violated. Thus, there is no attempt here, unlike in *Pennhurst*, to reinterpret the obligations the states undertook to perform when they accepted the grants. The Secretary is not trying to impose on any state a financial burden unanticipated when the grant was accepted. Instead, respondents, having received a grant of federal funds and expended it for purposes not contemplated in the award, seek unjustly to enrich themselves at the expense of the grant program by avoiding the repayment of the misspent funds. The question, then, is simply whether all the procedural details by which the Secretary may assure compliance with the agreed conditions of the grant must also be spelled out explicitly at the time the grant is accepted.

The imposition of such a requirement would be inconsistent with the settled principle that when Congress creates a statutory right, the existence of appropriate remedies to enforce that right will be presumed in the absence of a clear indication of a contrary congressional intent. *Texas & N.O.R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 569-570 (1930); *Sulli-*

van v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *United States* v. *Wurts*, *supra*, 303 U.S. at 416. Moreover, the practical effect of requiring precise statutory definition of the details of agency enforcement mechanisms would be to impede the ability of Congress to delegate authority to administrative agencies, and would seriously impair the flexibility necessary for agencies to enforce the legislation committed to them. See, *e.g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940); I K. Davis, *Administrative Law Treatise* § 2.05 (2d ed. 1979).[54]

In sum, we submit that the "overarching principle of *Pennhurst*" (Pet. App. 14a) is the concept of fairness. In *Pennhurst*, that principle precluded requiring the states to accept additional conditions not contained in the original grants; in this case, the same concept of fairness precludes permitting respondents to ignore the conditions that *were* contained in the original grants. It is hardly unfair to impose on respondents the obligation to account to the Secretary for the expenditure of federal funds pursuant to the conditions to which they agreed, and to repay those funds to which they were not entitled. To the contrary, allowing respondents to retain the large sums of misspent funds would be unfair to the intended beneficiaries of the Title I program and to the taxpayers whose monies have been diverted from their intended purposes. These latter interests are as deserving of protection here as were the interests of the grantees in *Pennhurst*.

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[54] In recognition of the need for administrative flexibility, a regulation promulgated or action taken pursuant to a congressional delegation of authority like that in 20 U.S.C. 242(b), which authorizes the Secretary to "make such regulations and perform such other functions as he finds necessary to carry out the provisions of this chapter," will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-281 (1966). If the court of appeals had applied this test, the Secretary's administrative recoupment procedure would clearly have been upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

I. Federal Claims Collection Act.

31 U.S.C. 952-953 provides in pertinent part:

952. Collection and compromise.

(a) The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

(b) With respect to such claims of the United States that have not been referred to another agency, including the General Accounting Office, for further collection action and that do not exceed $20,000, exclusive of interest, the head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, may (1) compromise any such claim, or (2) cause collection action on any such claim to be terminated or suspended where it appears that no person liable on the claim has the present or prospective financial ability to pay any significant sum thereon or that the cost of collecting the claim is likely to exceed the amount of recovery.

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953. Existing agency authority to litigate, settle, compromise, or close claims

Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims.

II. Federal Claims Collection Standards.

4 C.F.R. Parts 102-105 provide in pertinent part:

102.1 Aggressive agency collection action.

The head of an agency or his designee shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of, or referred to, his agency in accordance with the standards set forth in this chapter. * * *

102.2 Demand for payment.

Appropriate written demands shall be made upon a debtor of the United States in terms which inform the debtor of the consequences of his failure to cooperate. In the initial notification, the debtor should be informed of the basis for the indebtedness, the applicable requirements or policies for charging interest and reporting delinquent debts to commercial credit bureaus, and the date by which the payment is to be made (date due). The date due should be specified and, normally, should be not more than 30 days from the date of the initial notification. Three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that further demand would be futile and the debtor's response does not require rebuttal. Further exceptions may be made where it is necessary to protect the Government's interests (e.g., the statute of limitations (28 U.S.C. 2415). Agencies should respond promptly to communications from the debtor. Agencies should advise debtors who dispute the debt to furnish available evidence to support their contentions.

102.3 Collection by offset.

(a) Collections by offset will be undertaken administratively in accordance with these standards and implementing regulations established by the head of each agency on claims which are liquidated or certain in amount in every instance in which this is feasible. Collections by offset from persons receiving pay or compensation from the Federal Government shall be effected over a period during which such pay or compensation is to be received. See 5 U.S.C. 5514.

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102.17 Additional administrative collection action.

Nothing contained in this chapter is intended to preclude the utilization of any other administrative remedy which may be available.

105.1 Prompt referral.

Claims on which collection action has been taken in accordance with Part 102 of this chapter and which cannot be compromised, or on which collection action cannot be suspended or terminated, in accordance with Parts 103 and 104 of this chapter, will be referred to the General Accounting Office in accordance with R.S. 236, as amended, 31 U.S.C. 71, or to the Department of Justice, if the agency concerned has been granted an exception from referrals to the General Accounting Office. Such referrals should be made as early as possible consistent with aggressive agency collection action and the observance of the regulations contained in this chapter and in any event well within the time limited for bringing a timely suit against the debtor.

* * * * *

105.4 Report of prior collection actions.

A checklist or brief summary of the actions previously taken to collect or compromise a claim will be

forwarded with the claim upon its referral to the General Accounting Office or to the Department of Justice. If any of the administrative collection actions enumerated in Part 102 of this chapter have been omitted, the reason for their omission will be given with the referral. The General Accounting Office and the Department of Justice may return or retain claims at their option when there is insufficient justification for the omission of one or more of the administrative collection actions enumerated in Part 102 of this chapter.

III. General Education Provisions Act.

20 U.S.C. (Supp. V) 1226a-1 [1] provides:

> Payments pursuant to grants or contracts under any applicable program may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine.

20 U.S.C. (Supp. V) 1234a provides in pertinent part:

> (a) Final audit determination; written notice to State or local educational agency
>
> Whenever the Secretary determines that an expenditure not allowable under a program listed in section 1232d(a) of this title, or conducted under title VI and title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 3191 et seq., 3221 et seq.] or under the Emergency School Aid Act [20 U.S.C. 3191 et seq.] has been made by a State or by a local educational agency, or that a State or local educational agency has otherwise failed

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[1] The same provision originally appeared in 20 U.S.C. (1976 ed.) 1232d.

to discharge its obligation to account for funds under any such program, the Secretary shall give any such State or local educational agency written notice of a final audit determination, and he shall at the same time notify such State or agency of its right to have such determination reviewed by the Board.

(b) Application for review; * * *

A State or a local educational agency that has received written notice of a final audit determination and that desires to have such determination reviewed by the Board shall submit to the Board an application for review not later than thirty days after receipt of notification of the final audit determination. * * * Unless the Board determines that a final audit determination lacks sufficient detail, the burden shall be upon the State or local educational agency to demonstrate the allowability of expenditures disallowed in the final audit determination.

(c) Collection of amount owing to await final decision

When a State or a local educational agency has submitted an application for review with respect to a final audit determination, no action shall be taken by the Secretary to collect the amount determined to be owing until the Board has issued a final decision upholding the audit determination as to all or any part of such amount. * * *

(d) Finality

A decision of the Board with respect to an application for review under this section shall become final unless within sixty days following receipt by the State or by the local educational agency of written notice of the decision—

(1) the Secretary for good cause shown, modifies or sets aside the decision, in whole or in

part, in which case the decision shall become final sixty days after such action by the Secretary, or

(2) the State or the local educational agency files a petition for judicial review as provided in section 1234d of this title.

(e) Establishment of amount owing

A final audit determination by the Secretary under subsection (a) of this section with respect to which review has not been requested pursuant to subsection (b) of this section, or a final decision of the Board under this section upholding a final audit determination against a State or local educational agency shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with the Federal Claims Collection Act of 1966 [31 U.S.C. 951 et seq.].

* * * * *

(g) Five-year limitation period

No State and no local educational agency shall be liable to refund any amount expended under an applicable program which is determined to be unauthorized by law if that expenditure was made more than five years before that State or local educational agency is given the notice required by subsection (a) of this section.

20 U.S.C. (Supp. V) 2835 provides:

(a) Auditing

The Office of Inspector General of the Department of Education shall make provision for audits of grants made under this subchapter to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance

with applicable statutes, regulations, and terms and conditions of the grant or subgrant.

(b) Audit resolution and repayment

The Secretary shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,
Respondent.

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF FOR RESPONDENT STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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Questions Presented

1. Whether the Secretary of Education has the authority to administratively order the State of New Jersey to repay moneys received by it under Title I grants when such federal grants were awarded in 1970 and 1971 before the enactment of the 1978 Amendments to the Elementary and Secondary Education Act of 1965.

2. If the sanction of repayment of Title I moneys, included for the first time in the 1978 Amendments, is retroactively applied to an audit of Title I funds expended in the Newark school district for the 1970-71 and 1971-72 school years, whether the substantive challenges to the correctness of this federal audit, raised below but not reached by the Third Circuit, should be remanded for adjudication by the Third Circuit. Further, whether on remand, the Third Circuit should consider those aspects of the 1978 Amendments which are favorable to New Jersey, not simply the pay back provisions which redound to the favor of the Department.

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II. Should the decision below be reversed and the sanction of repayment, first included in the 1978 Amendments, be retroactively applied, this matter should be remanded for an adjudication of those substantive issues raised below but never reached by the Third Circuit with instructions that all sections of the 1978 Amendments be given retroactive effect 46

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R. Cappalli, Federal Grants and Cooperative Agreements (1982) 45

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H.R. Rep. No. 805, 93d Cong., 2d Sess. 67-68, reprinted in 1974 U.S. Code Cong. & Ad. News 4160-4161 45

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State of New Jersey, Thirty-Second Annual Report of the Commissioner of Education 5

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No. 81-2125

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Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF FOR RESPONDENT STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

Statement of the Case

This case concerns the propriety of an administrative order directing the State of New Jersey, Department of Education, to refund to the United States Department of Education $1,031,304 in Title I moneys expended by the Board of Education of the City of Newark during the 1970-71 and 1971-72 school years.[1] This order, issued on May 7, 1980, resulted from an audit of the Newark Title I program which concluded that certain school attendance areas within the City had been improperly classified as eligible for receipt of Title I funding.

Title I of the Elementary and Secondary Education Act of 1965 was intended to provide financial assistance in "areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 241a. Although this legislation has been subject to frequent amendment, its basic objective has remained constant.[2] Thus, under Title

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[1] The United States Court of Appeals for the Third Circuit, in the opinion before this Court, reversed final decisions stemming from unrelated administrative proceedings involving the State of New Jersey and the Commonwealth of Pennsylvania. The facts set forth in this brief relate solely to the New Jersey Title I program and administrative proceeding.

[2] Pub. L. No. 89-10, 79 Stat. 27, *amended by* Pub. L. No. 89-750, 80 Stat. 1191 (1966); Pub. L. No. 90-247, 81 Stat. 783 (1967); Pub. L. No. 91-230, 84 Stat. 121 (1969, *enacted* 1970); Pub. L. No. 92-318, 86 Stat. 235 (1972); Pub. L. No. 93-380, 88 Stat. 484 (1974); Pub. L. No. 94-482, 90 Stat. 2081 (1976); Pub. L. No. 95-112, 91 Stat. 911 (1977); Pub. L. No. 95-561, 92 Stat. 2143 (1978); *and* Pub. L. No. 96-46, 93 Stat. 338 (1979). Currently, Title I funds are authorized as part of the Omnibus Budget Reconciliation Act of 1981. See Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95

(Footnote continued on following page)

I, substantial amounts of federal aid have been directed to local school districts experiencing difficulties in funding adequate programs due to concentrations of low-income families. H. R. Rep. No. 1137, 95th Cong., 2d Sess. 1, 2, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 4971, 4972. Recognizing that Title I would be more effective if State and local officials had adequate notice of the level of Title I funds available, Congress designated Title I as an advance funding program. See Pub. L. No. 93-380, 88 Stat. 484 (enacted 1974, codified at 20 U.S.C. § 1223 (1976 Supp.)).

This legislation places essential responsibility for designing and implementing Title I educational programs with those local educational agencies, most typically public school districts, which have concentrations of disadvantaged children within their attendance areas. 20 U.S.C. § 244(6)(B). This commitment of educational decision-making to local officials reflected the Congressional aversion to the "federalization" of education.

> It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district. [H.R. Rep. No. 143, 89th Cong., 1st Sess. 5 (1965); S. Rep. No. 146, 89th Cong., 1st Sess. 9 (1965)].

(Footnote continued from preceding page)

Stat. 463 (codified at 20 U.S.C. § 3801 et seq. (1982 Supp.)). References to the various pieces of amending legislation will be by the date contained in their short titles - - - - *e.g.* 1978 Admendments.

Consistent with this demarcation of responsibilities, the local educational agency develops an educational program to meet the unique needs of economically and educationally deprived children within its attendance areas and submits the proposal to the State educational agency for approval. If acceptable, the State will approve the proposal and submit it to the United States Department of Education supported by its assurances that the State and local agencies will comply with the provisions of Title I.[3] It is the United States Department of Education which has the ultimate responsibility for administering the Title I program and dispensing the funds appropriated thereunder.

Consistent with this structure, the Board of Education of the City of Newark, the local educational agency involved in the New Jersey administrative proceeding, submitted a Title I proposal to the New Jersey Department of Education for each of the three fiscal years covered by the present federal audit: 1970-71, 1971-72 and 1972-73. These proposals were approved by the State of New Jersey and submitted together with the State's assurances to the appropriate federal officials.

The Newark Title I application for the 1971-72 fiscal year, which was the primary focus of the federal audit, showed that 33.9% of the children in the Newark school district were from low-income families (J.A. 20).[4] The

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[3] The Department of Education, created by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3508 (Supp. III 1979)), is the successor to the Office of Education in the Department of Health, Education and Welfare.

[4] As used herein, "J.A." refers to the Joint Appendix; "Pet. App." to the Appendix to the Petition for Writ of Certiorari; "Pet. C." to the Petition for Writ of Certiorari; "Pet. B." to the Petitioner's brief on the merits; and "R.N.J. App." to the Appendix to Respondent New Jersey's brief.

statistics further demonstrated that in some areas of the City the incidence of children from low-income families was as high as 80%. The Newark application showed that 53 of the 67 schools in the City had low-income percentages higher than the district-wide average of 33.9% while only 6 schools had less than 20% low-income students. The narrative portion of the 1971-72 application also demonstrated that Newark was uniformly disadvantaged in other ways. The City was then, as it still is today, in a more advanced state of urban decay than any other in the country. Statistics showed a jobless rate in 1970 of 14%, a rate double that needed to qualify, at that time, under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city. At the time the 1971-1972 proposal was submitted, Newark had a black population of 54.2% with another 11% of its population of Hispanic background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics of Newark's low-income population, was the fact that in 1970-71, Newark had the highest population turnover in the nation. Indeed, Model Cities data indicate that mobility rates reached as high as 80% for schools in the Title I area (J.A. 176).

The Department of Health, Education and Welfare Audit Agency conducted an audit of the Title I program, designed and implemented by the Board of Education of the City of Newark, for the period from September 1, 1970 to August 31, 1973. During that three year period, of the $156,166,574 in Title I funds allotted to the State of New Jersey, $28,709,198 was sub-allotted to the City of

Newark.[5] The principal objective of the audit was to determine the "propriety and efficacy" of the method employed by Newark to select eligible school attendance areas (J.A. 14). At that time, the statutory eligibility standard simply provided that Title I funds should be used for projects designed to meet the special educational needs of educationally deprived children in "school attendance areas having high concentrations of children from low-income families," 20 U.S.C. § 241c (a)(1). This broad standard was interpreted by § 116.17(d) of the Title I regulations then in place (45 C.F.R. § 116.17(d)) as including (1) attendance areas in which the number of children from low-income families was as large as, or larger than, the average number of such children in the various attendance areas of the school district, and (2) attendance areas in which the percentage of children from low-income families was as large as, or larger than, the per-

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[5] The Board of Education for the City of Newark had a student enrollment of 82,713 for the 1970-71 school year and a current expense budget of $91,803,514. Of that amount, $21,566,996 represented State aid, $9,631,019 Title I and $4,842,261 other federal aid. For 1971-72, the student enrollment was 82,894 and the current expense budget $102,818,745. Of that amount, $29,-069,240 was State aid, $9,899,446 Title I and $6,410,390 other federal aid. In 1972-73, the student enrollment was 81,801 and the current expense budget was $116,354,650. Of that amount, $38,-517,410 represented State aid, $9,379,648 Title I and $7,746,792 other federal aid. For the most recent school year, 1982-83, 58,729 students are enrolled in the Newark school district which has a current expense budget of $201,422,200. Of that amount $132,769,653 represents State aid, $10,795,535 Title I and $9,406,942 other federal aid. State of New Jersey, *Twentieth Annual Report of the Commissioner of Education;* State of New Jersey, *Twenty-First Annual Report of the Commissioner of Education;* State of New Jersey, *Twenty-Second Annual Report of the Commissioner of Education;* State of New Jersey,*Thirty-Second Annual Report of the Commissioner of Education.*

centage of such children in the school district. Section 116.17(d) also permitted an entire school district to be designated as eligible when there was no wide variance in the number or percentage of children from low-income families.

Because of the unavailability of complete AFDC statistical data showing the number of low-income children *eligible* to attend school in each specific area[6] and because of extremely high mobility of much of its school age population, Newark was unable to determine eligibility of school attendance zones for the 1971-72 school year in strict conformity with 45 C.F.R. § 116.17(d). However, as recognized by the auditors, it employed the reasonable alternative of measuring eligibility by the number of children from low-income families actually enrolled in public schools in the various attendance areas (J.A. 21).[7] The auditors, analyzing this alternative method, discovered that the Newark Board had erred in its application. In determining the

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[6] AFDC statistics were accepted by the then Office of Education as an acceptable data source for determining the number of children from low-income families. *ESEA Title I Program Guide # 44* (March 18, 1968).

[7] The AFDC statistics provided the Newark Board of Education by the Essex County Welfare Board only listed the number of AFDC children enrolled in each regular public elementary and secondary school. The Welfare Board did not report AFDC children attending private schools, schools for handicapped children or those AFDC children who were "drop-outs" from the educational system (J.A. 20). It was, therefore, impossible for Newark to determine the number or percentage of low-income children *eligible* to attend the public schools. Rather, Newark was forced to utilize statistics which simply showed the number of low-income children actually attending the public schools. It was a methodology which, by its very nature, resulted in an underreporting of low-income children.

Title I eligibility of its attendance areas, the Newark Board had used a ratio which included, in its numerator, AFDC children actually enrolled in public schools but which included, in its denominator, only the total enrollment of the elementary schools. The auditors found this formula unacceptable since there was no direct relationship between the component elements and replaced it with one which eliminated the AFDC children enrolled in the secondary schools. By applying their revised formula, the auditors determined that Newark had misclassified 13 schools as eligible for Title I funding in 1971-72.[8]

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[8] The following schools were found to be ineligible for Title I funding, in 1971-72, under the auditors' recalculation:

School	Low-Income Percentage Shown by Newark on Application	Low-Income Percentage As computed by Auditors	Title I Expenditures
Madison	60.6	28.8	$ 103,750
Newton Street	54.9	31.5	69,463
So. 17th Street	53.1	33.5	104,842
Central Avenue	53.0	29.4	61,532
Burnet Street	50.6	30.2	56,007
Waverly Avenue	49.9	31.9	56,665
Franklin	46.5	32.4	115,227
Marcus Garvey	46.2	22.9	119,487
Garfield	34.7	20.6	81,976
Hawkins	34.7	30.3	102,803
Clinton Jr. High	69.5	32.1	58,214
Weequahic High	37.5	27.9	53,284
East Side High	35.0	13.0	46,380
			$1,029,630

(J.A. 23 to J.A. 25).

In addition to this error, which occurred only in 1971-72, the auditors also determined $132,287 in Title I funds had been used during 1970-71 in schools which, in their opinion, did not meet the eligibility requirements of the Title I regulations. The auditors observed, however, that the deficient practices utilized by Newark to determine Title I eligibility were corrected by 1972-73, the third and final year covered by the audit. There were no audit exceptions for that year (J.A. 15). On the basis of their report, the auditors concluded that arrangements should be made for the State to return $1,161,917 to the Office of Education.

The initial audit report of the Newark Title I program was received by the New Jersey Department of Education on October 21, 1974 while the final report was dated June 20, 1975. This was followed by a Final Audit Determination Letter, dated June 11, 1976, in which the Deputy Commissioner for School Systems demanded that the New Jersey State Department of Education "refund $1,161,917 to the Office of Education". The State was further informed that it could either "submit payment" in that amount or appeal the final audit determination (J.A. 137 to J.A. 138). In a letter dated July 26, 1976, the State of New Jersey appealed that determination and, at the same time, questioned the authority of the Office of Education to seek the repayment of funds (J.A. 188 to J.A. 189).

In its Application for Review, dated October 21, 1976, the State of New Jersey advanced its substantive challenges to the Final Audit Determination. The State argued, at the outset, that the attendance areas declared ineligible by the federal auditors were, in fact, eligible for Title I assistance. In support of this position, the State submitted recalculations of Title I eligibility. These recalculations measured eligibility by comparing the total number of AFDC children from each attendance area enrolled in public elementary and secondary schools with the total number of

children from the area enrolled in public elementary and secondary schools (J.A. 226). The formula employed by the State responded to the auditors' criticism of the Newark methodology since the component elements were directly related. More importantly, unlike the federal recalculations, it did not remove AFDC children in secondary schools from the formula; rather, it simply added all children in public secondary schools to the comparison. The State's recalculations, therefore, more accurately reflected the number of low-income children attending public schools in the various attendance areas than did those of the federal auditors.[9] In the alternative, New Jersey

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[9] Following is a comparison of the recalculations of Title I eligibility performed by the HEWAA auditors and by New Jersey:

	1971 Low Income Percentage	
	Recalculations of HEWAA Auditors	Recalculations of New Jersey
Madison	28.8	39.7
Newton Street	31.5	42.8
So. 17th Street	33.5	40.3
Central Avenue	29.5	41.4
Burnet Street	30.2	39.0
Waverly Avenue	31.9	37.2
Franklin	32.4	34.8
M. Garvey	22.9	36.1
Garfield	20.6	26.0
Hawkins	30.3	25.9

(Pet. App. 52a)

The State did not submit recalculations for the secondary schools since it was the State's position that, under the applicable rules, only elementary attendance areas had to qualify as eligible attendance areas (Pa371; Vol. II of Appendix submitted on behalf of Petitioner, State of New Jersey, in the Third Circuit).

argued that the whole of the Newark school district, which had a district-wide low-income percentage of 33.9%, qualified for designation as a Title I area under regulations applicable in 1971 and in accordance with the clearly expressed intent of Congress (J.A. 177 to J.A. 179). In its application, the State also expressed its confidence:

> . . . that it will prevail in this application, and therefore will not address the question of refunds at this time. However, it is aware of no authority for this refund procedure and reserves its right to challenge OE's authority to employ it at a later date. (J.A. 170).

That issue was specified among the legal contentions advanced by the State of New Jersey and incorporated in the Pre-Hearing Memorandum, dated March 31, 1978 (J.A. 223). It was also briefed and argued, together with its substantive arguments, by the State of New Jersey.

In its decision of February 19, 1980, the Education Appeal Board rejected the State's argument that the Commissioner was without statutory authority to order repayment of Title I funds observing, at the same time, that this issue was one which "may ultimately be raised and determined in an appropriate judicial forum" (Pet. App. 39a). The Board then went on to reject the substantive arguments advanced by New Jersey and demanded that the State repay $1,031,304 to the United States Department of Education. The only difference between this sum and the repayment demanded in 1976 was $130,613, an amount barred by operation of the applicable statute of limitations. 20 U.S.C. § 884 (1976) (Pet. App. 35a to 36a). By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States De-

partment of Education and again informed that it should refund $1,031,304 to the Department (Pet. App. 88a).

The State of New Jersey, Department of Education, filed a Petition for Review of the Secretary of Education's decision with the United States Court of Appeals for the Third Circuit, pursuant to 20 U.S.C. § 2851. In its Petition, New Jersey, in addition to arguments on the substantive validity of the audit, contended that the United States Department of Education was without statutory authorization to order the State to repay moneys received under Title I grants in the 1970 and 1971 school years. Rather, it was limited to withholding future payments to satisfy any sums found due on audit.

The Third Circuit issued an Opinion on October 13, 1981, in which it granted the Petitions for Review of both New Jersey and Pennsylvania, reversed the Orders of the Department of Education and remanded the cases with instructions "to vacate the orders requiring a repayment by petitioners of previously received Title I funds" (Pet. App. 25a). Since it was concluded that the Department did not have authority to issue these Orders, the Court did not reach the challenges advanced by New Jersey to the correctness of the audit findings or the challenges of Pennsylvania to the Department's interpretation of the Act's statute of limitations or to the sufficiency of its rulemaking proceedings (Pet. App. 3a).

The underpinning of the Third Circuit's decision was the "overarching principle" of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981) "that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant" (Pet. App. 14a). The Court below found that at the time the Title I grants were made to New Jersey and Pennsylvania, Congress had not statutorily authorized the Department of

Education to order the repayment of misspent or misapplied funds (Pet. App. 18a). Indeed, it was not until five years after the last of the disputed funds were received, that the 1978 Amendments to the Elementary and Secondary Education Act specifically authorized that sanction. Applying the *Pennhurst* rationale, the Third Circuit held that the Department of Education was limited to those statutory remedies, such as withholding funds or disapproving applications, which were clearly in effect when the Title I funds were received by New Jersey and Pennsylvania. However, Title I participants who have received funds after the effect of the 1978 Amendments, which authorized the Department to order the repayment of misspent or misapplied funds, have been clearly "advised by Congress" that such sanction may be utilized against them (Pet. App. 7a; Pet. App. 24a).

The Third Circuit also considered the federal government's argument that it had a common law right to recover misspent funds which right could be exercised within the context of an administrative proceeding. The Court below held that "if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common law right to recover misspent funds, it may do so only by maintaining a civil action in a court of competent jurisdiction" (Pet. App. 25a). In a concurring opinion, however, Judge Higginbotham observed that since the Department had never endeavored to exercise its common law rights, that issue was not properly before the Court and the Court's discussion of those rights was *dictum* (Pet. App. 26a).

The Third Circuit, in an Order entered December 17, 1981, denied a Petition for Rehearing. On May 17, 1982, a Petition for Writ of Certiorari was filed on behalf of the Secretary of Education which Petition was granted by this Court on October 4, 1982.

Summary of Argument

The power of Congress to regulate the States pursuant to the spending power is subject to the well recognized limitation that the terms and conditions which Congress seeks to impose upon the States pursuant to the "contract" must be clearly and unambiguously stated. This clear statement rule emanates from fundamental considerations of sovereignty. While a State may derogate its sovereignty by entering into a contract with the Federal Government, it must have the capability of doing so knowledgeably and voluntarily. In this appeal, the Department seeks to retroactively deny that right to New Jersey by imposing *ex post facto* conditions on the Title I agreements entered into by New Jersey and the Federal Government for the 1970-71 and 1971-72 school years.

During this period, there existed in Title I only one statutory sanction in the event a State was determined to be in substantial noncompliance with the program's requirements. That sanction was the prospective withholding of Title I funds. In asking this Court to retroactively modify that agreement, in a way more beneficial to it and in light of subsequent enactments, the Department seeks to contravene the established body of law governing federal-state relations in the context of grants-in-aid.

The Department's brief avoids the basic considerations of federalism at issue in this case. Rather, it relies upon oblique references to the Federal Government's right to recoup. Reference to a power to recoup is not helpful, however, because the term lacks precision. The question presented here is the method of recovery. New Jersey recognizes the Department's ability to offset to recover amounts legitimately owed to it under Title I. To the extent the Department is willing to use an offset mechanism, there is

no controversy between the parties except, of course, the substantive issue of what, if anything, is owed, which issue the Third Circuit, in light of its holding, never addressed.

The basic point is that the right to demand repayment was not expressly made a condition of the agreement entered into between the Federal Government and New Jersey. Such a right may not be read into the agreement under a theory that it was implied by Congress. Terms and conditions cannot be implied in an agreement between the Federal Government and a sovereign State in the context of a grant-in-aid statutory scheme enacted by Congress pursuant to the Spending Clause. The terms and conditions must be clearly and unambiguously stated. Congress must confront and resolve the competing interests involved in federal-state relations in the context of grants-in-aid and should not be permitted to benefit from subsequent unilateral alterations of the basic terms of commitment between the two. The clear statement rule is thus an essential complement to the political check on Congressional power. The approach to statutory construction of a grant-in-aid ought to reinforce the protections inherent in pluralism and federalism.

Since the State of New Jersey has not voluntarily and knowingly agreed to a contract with the Federal Government which includes the sanction of repayment for noncompliance, the Department's efforts to enforce that sanction run counter to the dictates of the Tenth Amendment. The Department's order that New Jersey repay $1,031,304 in Title I funds, not only represents a mandate that the State appropriate funds for a specific purpose but constitutes a significant intrusion into the area of education—an area recognized to be one of unique State and local concern and control. The inappropriateness of the Department's attempt to demand repayment is highlighted by the fact that

a less intrusive method of recovering the disputed funds is available and was agreed to by New Jersey when it agreed to participate in the Title I program in 1970-71 and 1971-72. That method is offset.

Finally, the Department's argument that the 1978 Amendments, which for the first time authorized the sanction of repayment, should be retroactively applied to an audit of Title I funds expended in the 1970-71 and 1971-72 school years, is similarly lacking in merit and persuasiveness. The Third Circuit correctly applied the general rule against retroactive application of statutory enactments. Retroactive application is especially inappropriate because manifest injustice to the sovereign State will result if this Court allows the Department to rewrite the contract entered into between the Federal Government and the State according to the unilateral desires of the Department.

Should this Court reverse the decision below, and retroactively apply the sanction of repayment included in the 1978 Amendments, the substantive issues raised by New Jersey below, but not reached by the Third Circuit, must be resolved before New Jersey is directed to repay any moneys. Since these substantive issues were never addressed by the Court below, it would be consonant with the practice of this Court to remand those issues to the Third Circuit for adjudication. Since this remand would only be required if retroactive application is given to the sanction of repayment included in the 1978 Amendments, the remand should be accompanied by instructions to the Third Circuit that those aspects of the 1978 Amendments which impact on Title I eligibility should also be given retroactive effect. To do less, to impose upon New Jersey the additional burdens contained in the 1978 Amendments while, at the same time, denying the State its benefits, would be doubly unfair.

POINT I

Absent any express authorization in Title I for the sanction of requiring a state to repay funds allegedly misspent, it is wholly inappropriate to imply such a power over the sovereign states in the context of legislation enacted pursuant to the spending power.

At issue is the authority of the United States Department of Education to administratively order the State of New Jersey to repay funds received in the 1970-71 and 1971-72 school years under Title I of the Elementary and Secondary Education Act of 1965 (Title I). See 20 U.S.C. § 241a *et seq.* (1974).[10] The funds were allegedly not spent

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[10] In its brief on the merits, the Department presents, for the first time, the question of whether the Department of Education may collect by administrative offset amounts allegedly due from grant-in-aid recipients. However, an examination of the record reveals that this question was not raised before the Third Circuit and was not set forth in its Petition for a Writ of Certiorari. In fact, New Jersey does not dispute the Department's statutory authority to utilize the offset procedure. More accurately, New Jersey's challenge is to the Department's power to demand a repayment of Title I moneys already spent by a local school district in New Jersey. The Third Circuit opinion acknowledges that the procedure of withholding funds was within the "clear and unambiguous terms of the statute in effect when the deposited funds were received." *State of New Jersey, Dept. of Educ.* v. *Hufstedler,* 662 F.2d 208, 211 (3d Cir. 1981) (Pet. App. 7a). But the Department chose not to pursue that remedy and now implies that the Third Circuit found it lacked authority to do so, when no such issue was ever presented to the Court.

Pursuant to Rule 21(1)(a), only the questions set forth in the petition for a writ of certiorari or fairly included therein will be considered by the Court. See also, *General Talk. Pictures*

(Footnote continued on following page)

in accordance with the provisions of Title I. New Jersey has maintained throughout this controversy that the Department had available only one sanction for failure to comply with the statute's provisions, namely the sole sanction expressed in the statutory scheme itself. That sanction is the power to withhold future payments of Title I funds.

Effective at the time the Final Audit Determination letter issued in this matter was 20 U.S.C. § 241j which provided:

> Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 241e(c) or 241f(b) of this title, the Commissioner

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(Footnote continued from preceding page)

Corp. v. *Western Electric Co.*, 304 U.S. 175, 179 (1938); *Mayor* v. *Educational Equality League*, 415 U.S. 605, 623 (1974); *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954). An issue must have been before the lower court for it to be considered by the Supreme Court. *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 4 (1916); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957). This Court limits its consideration to those issues set forth in the "Questions Presented" in the petition for a writ of certiorari and has specifically disapproved of "the practice of smuggling additional questions into a case" after certiorari is granted. *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

This well-established practice should be followed with regard to the additional issue concerning the power to use administrative offset which is raised by the Department at this stage of the proceeding. Disregard of this issue is even more compelling because New Jersey does not dispute the Department's authority to use the offset mechanism. Indeed, if use of the offset method is acceptable to the Department, there is no meaningful controversy between the parties other than the question of whether the funds were actually misspent—an issue presented before the Third Circuit but not reached in its decision.

> shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall not make further payments under this subchapter to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this subchapter, or payments by the State educational agency under this subchapter shall be limited to local educational agencies not affected by the failure, as the case may be.[11]

The Department does not, and cannot, point to any express authorization in the Title I statutory scheme in effect during the audited period establishing the existence of alternative sanctions. Indeed, the Department does not dispute that there was no express statutory authorization for requiring repayment of allegedly misspent Title I funds during the audited period. Rather, the Department contends that such power was implied and, as proof of *sub silentio* congressional intention, relies upon subsequent amendments to Title I and legislative history surrounding those amendments. New Jersey submits that the Department's reliance upon implied conditions in the Title I scheme is totally misplaced.

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[11] Similarly, the more general provisions of the education statutes governing the operation and administration of education programs, 20 U.S.C. § 1230 *et seq.* (1974), also provided the Commissioner of Education with but one remedy for program violations, that being the prospective withholding of funds. 20 U.S.C. § 1232(c) (1974).

A. To allow the Department to require New Jersey to pay back moneys expended in the Newark School District during the 1970-71 and 1971-72 school years by retroactive application of the sanction of repayment, first included in the 1978 Amendments, offends the basic principles of federalism.

It is beyond challenge that Congress has the power to fix the terms upon which allotments to the States shall be disbursed. See, *e.g., Oklahoma* v. *United States Civil Serv. Comm'n.*, 330 U.S. 127, 143 (1947); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958). However, when Congress seeks to regulate the States pursuant to the spending power, certain limits attach.[12] Crucial to the exercise of Congress' power to impose terms and conditions upon the States pursuant to the spending power is the requirement that the terms and conditions be clearly stated. See *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17-18 (1981); *Bd. of Educ., Hendrick Hudson School Dist.* v. *Rowley*, —— U.S. ——, 102 S.Ct. 3034, 3042 n.11 (1982); *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring). See also *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284-285 (1973); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). See generally L. Tribe, *American Constitutional Law* §§ 5-8, 5-10 and 5-20 (1978). The reason for this requirement generates from fundamental considerations of sovereignty. As stated by this Court in *United States* v. *Bekins*, 304 U.S. 27 (1938):

> It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. * * * The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and

[12] It was stipulated below that Title I was enacted in exercise of the spending power, U.S. Const. art. I, § 8, cl. 1 (Pet. App. 13a, n.15).

> give consents where that action would not contravene the provisions of the Federal Constitution [*Id.* at 52].

Furthermore, the Court stated:

> As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. And we added that "Nowhere in our scheme of government—in the limitations express or implied of our federal Constitution—do we find that she [the State] is prohibited from assenting to conditions that will assure a fair and just requital for benefits received" [*Id.* at 53].

See also *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 597 (1937) ("Even sovereigns may contract without derogating from their sovereignty").

This Court has recognized that "legislation enacted pursuant to the spending power is much in the nature of a contract . . ." *Pennhurst State School & Hospital* v. *Halderman, supra,* 451 U.S. at 17. In exchange for the receipt of federal funds, the States accept the terms and conditions fixed by Congress as preconditions for disbursement of the federal funds. *Ibid.* See *King* v. *Smith,* 392 U.S. 309, 333 n.34 (1968); *Oklahoma* v. *United States Civil Serv. Comm'n., supra,* 330 U.S. at 144. For the legislation to be legitimate there must be voluntary and knowing acceptance by the States of the terms of the "contract." *Pennhurst State School & Hospital* v. *Halderman, supra,* 451 U.S. at 17. See *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 585-598. Essential to voluntary and knowing acceptance by a State is legislative clarity in the terms and conditions Congress seeks to impose in exchange for the receipt of federal funds. As this Court stated in *Pennhurst*:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation [451 U.S. at 17 (citations omitted)].

See also *Bd. of Educ., Hendrick Hudson School Dist.* v. *Rowley, supra,* —— U.S. at ——, 102 S.Ct. at 3042 n.11; *Univ. of Texas* v. *Camenisch, supra,* 451 U.S. at 399 (Burger, C.J., concurring).

Among the most significant concerns which a State must consider upon entering into a "contract" with the Federal Government are the consequences which flow from participation. Especially in the situation of an innovative, untested federal program, a State would undoubtedly be concerned with possible sanctions which might be inflicted upon it should errors occur in the implementation of the program in its early years. This is particularly true in the Title I program where initial responsibility for designing and implementing the program rests not with the State but with the local school districts. The Title I statutory scheme, in place during the 1970-71 and 1971-72 school years, provided one sanction should a State be found out of compliance with the program's requirements. That sanction was prospective only. It required the Commissioner of Education to withhold future payments from a State, or to require the State to withhold future payments from a specific local education agency, if he finds that there has been "a failure to comply *substantially* with any assurance set forth in the application of that State . . ." 20 U.S.C. § 241j (1974) (emphasis added). The

reason for the prospective nature of this single sanction authorized by Congress during the early years of Title I is readily discernible. At the time in question, Title I represented an ambitious and somewhat unusual "federal foray" into the educational domain; it operated under a set of rules and regulations that were untested, unclear and confusing.[13] Sound policy reasons support the Congressional determination to provide a remedy which would not severely penalize the States, or the children for whose benefit the program was designed, for violations of regulatory requirements which might occur despite good faith efforts to correctly implement the program. The prospective nature of the sanction imposed during the early years of Title I assured that the States would bring their programs into compliance if they wished to continue receiving federal funds and that the Federal Government would be made whole for funds allegedly misspent while, at the same time, not interfering with the internal fiscal affairs of the individual states.

Similar considerations underlie this Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970). In *Rosado*, this Court reviewed the compatibility of New York's Social Services Law with § 402 of the Social Security Act as amended. Under scrutiny was an Aid to Families with Dependent Children (AFDC) program. As in the Title I scheme, a State desirous of obtaining federal funds for AF DC programs is required to submit a plan to the federal

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[13] The legislative history of the 1978 Amendments to Title I acknowledges that the prior version of the law needed simplifying and clarifying and that local school districts had often been subjected to disparate treatment because of the unclear nature of the law. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 41-56, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5011-5026.

agency charged with responsibility for administering the grant scheme, here the Department of Health, Education and Welfare (HEW). *Id.* at 406 n.8. The Secretary of HEW must afford a State notice and opportunity for a hearing on any alleged noncompliance with federal requirements. *Ibid.* If after notice and hearing the State is determined to be not in compliance with federal requirements, the Secretary is directed by statute, 42 U.S.C. § 604a (1964 ed. Supp. IV), "to make a total or partial cutoff of federal funds to the State." *Ibid.* In *Rosado,* New York's program was found to be incompatible with § 402a(23) of the Social Security Act and the Court determined that petitioners were entitled to injunctive relief against other payments of federal funds should the State not develop a conforming plan within a reasonable period of time. *Id.* at 420. The Court, however, was sensitive to the massive cost to the State of New York to bring its program into compliance. *Id.* at 421. Accordingly, the relief ordered by this Court was to remand the matter to the District Court for the fixing of a date by which the State was to revise its program, should it so wish, so as to be in compliance with federal law. If New York chose not to submit a revised program by that date, then the District Court was to restrain the further use of federal funds under the statute in issue. *Ibid.*

Thus, in *Rosado,* this Court curtailed the use of a corresponding prospective sanction in a federal funding scheme because of the significant impact to the State's finances threatened by immediate withholding of future payments. In this matter, New Jersey does not even seek the somewhat drastic fashioning of relief authorized by this Court for the State of New York in *Rosado.* New Jersey seeks merely to have this Court find, as did the Third Circuit, that the Department's remedies in administering the Title I program are limited to those sanctions specifically set forth in the Title I statute at the time the State volun-

tarily entered into the federal funding program. To imply the existence of a further and much harsher sanction, that of requiring a sovereign State to make a repayment of moneys representing a refund of Title I funds which admittedly were spent on appropriate supplemental educational programs but which were allegedly spent in a manner not strictly in conformance with Title I requirements, would be inappropriate.[14]

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[14] The Department appears to claim that New Jersey knew of the existence of the sanction of repayment at the time it entered into the 1970-71 and 1971-72 grant agreements (Pet. B. 40). As proof of this knowledge, the Department points to a list, submitted by Senator Schmitt, which was printed in the Congressional Record (127 Cong. Rec. S5429 (daily ed. May 21, 1981)). The list purports to identify those States which "have paid back Title I claims— *prior to 1978* based upon violations found in using funds." The listing includes two entries for New Jersey, the first for $1,306 and the second for $4,000. Unfortunately, the listing is inaccurate as far as the New Jersey entries are concerned. The $4,000 represented not a pay back based on "violations found" but rather a settlement of a $9,805 audit claim which was finalized on February 23, 1981. Interestingly, the attorneys representing the State and the United States Department of Education in that settlement were the same attorneys involved in the Newark Title I appeal which was then pending before the Third Circuit. It was clearly understood that the Camden Title I settlement in no way compromised the State's position in the Newark matter. The $1,306 entry is even more problematic. The State's records disclose no such repayment. However, since the amounts listed are "approximations", it is fair to assume that this amount represents the portion of the Newark audit exception for the 1970-71 school year which was not barred by operation of the statute of limitations: $1,674 (Pet. App. 57a). This amount, involved in the present controversy, has clearly not been repaid to the Department. These two faulty entries in the May 21, 1981 Congressional Record constitute a very unstable foundation from which to construct the argument that the State of New Jersey knowingly entered into grant agreements in 1970 and 1971 which agreements included a repayment sanction.

Where Congress has clearly established an express remedy in the Title I scheme, this Court should be reluctant to find implied therein additional and greater remedies to be used against the States. See *Pollard* v. *Bailey*, 87 U.S. 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone must be employed."). See also *Middlesex Cty. Sewerage Auth.* v. *Sea Clammers*, 453 U.S. 1, 20 (1981) (The existence of sufficiently comprehensive remedial devices provided in a congressional enactment may suffice to demonstrate an intention to preclude permitting additional remedies, such as suits under 42 U.S.C. § 1983); *Nat. R. Passenger Corp.* v. *Passenger Ass'n.*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy . . . , courts should not expand the coverage of the statute to subsume other remedies").

Indeed, where the legislation is in the nature of a contract between the Federal Government and the States wherein the parties have every right to rely upon the exclusiveness of the terms and conditions of the agreement as memorialized in the legislation, this Court should be especially hesitant to retroactively modify that agreement so as to accord with the wishes of one of the parties. The approach to statutory construction which should be taken is one which reinforces the checks of pluralism and federalism. L. Tribe, *American Constitutional Law*, *supra*, §§ 5-8, 5-20. The requirement that a clear statement of congressional will manifest an exercise of congressional power is an important complement to the political check of congressional power. *Ibid.* Moreover, it is essential to maintaining the knowledgeable and voluntary nature of a State's decision to lay aside certain aspects of its sovereignty in order to contract and thus reap the benefits attendant to that contract.

Tenth Amendment considerations must perforce come into play in the analysis of this matter. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

The Constitution contemplates "an indestructible Union, composed of indestructible states" wherein both the state and national governments retain a "separate and independent existence". *Texas* v. *White*, 7 Wall. 700, 725 (1869); *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869). Federal legislation which might affect the economic independence of the States cannot be construed without regard to the implications to an individual system of government. *Kirschbaum* v. *Walling*, 316 U.S. 517, 520 (1942). The cases consistently reveal a process of "accomodation as between assertions of new federal authority and historic functions of the individual states". *Ibid.*

Adhering to the principles of federalism, the Court has repeatedly recognized that the Tenth Amendment restrains congressional action that would impair "a State's ability to function as a State." *United Transp. Union* v. *Long Island R. Co.*, —— U.S. ——, ——, 102 S.Ct. 1349, 1354 (1982); *Hodel* v. *Virginia Surface Min. & Recl. Ass'n.*, 452 U.S. 264 (1981); *National League of Cities* v. *Usery*, 426 U.S. 833, 842-852 (1976).

In *National League of Cities* v. *Usery, supra*, the Court considered a challenge to the 1974 Amendments to the Fair Labor Standard Act which had applied federal minimum wage and maximum hour regulations to most employees of state and local government. The issue under review was whether that congressional action encountered a Tenth Amendment impediment because the regulations applied directly to the states and subdivisions of states as employers.

Id. at 847. The Court commenced its analysis by making a clear distinction between congressional regulation of private entities "necessarily subject to the dual sovereignty of the government of the nation and of the State in which they reside" *Id.* at 545, and federal regulation "directed, not to private citizens, but to the States as States." *Ibid.* As to the private entities, the Court found no Tenth Amendment barrier to Congressional action. *Id.* at 840. However, the Court held that "the States as States stand on quite a different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." *Id.* at 854. When there is a direct attempt by Congress to regulate the States as States, it must be recognized that "there are attributes of sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of Legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner." *Id.* at 845. It was found that the regulations in issue would impair the State's authority "to structure integral operations in areas of traditional government functions." *Id.* at 852. Therefore, pursuant to the Tenth Amendment Congress could not "abrogate the State's otherwise plenary authority" to make these decisions. *Id.* at 846.

This Court has recently identified three separate inquiries underlying the result in *National League of Cities* v. *Usery*. A congressional action is violative of the Tenth Amendment if it regulates the "States as States," if it addresses matters that are indisputably "attributes of state sovereignty" and if it directly impairs the State's ability "to structure integral operations in areas of traditional governmental functions." *Hodel* v. *Virginia Surface Min. & Recl. Ass'n, supra,* 452 U.S. at 287-288 (quoting, *National League of Cities* v. *Usery, supra,* 462 U S. at 854,

845, 852). In the matter now before this Court, a vital area of a State's sovereignty would be affected should the Department's reading of the pre-1978 Title I scheme prevail. If ordered to repay Title I funds to the Department, which funds admittedly were expended to provide appropriate supplemental educational programs for disadvantaged children, New Jersey would be faced with several unpalatable options by which it could comply with this federal order.[15] The first would be to seek a supplemental appro-

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[15] These consequences were fully understood by the Department. At oral argument before the Title I Audit Hearing Board, Counsel for the Deputy Commissioner contended:

> . . . by demanding a refund, we are not diminishing the responsibility of SEA [New Jersey] and LEA [Newark] to maintain current programs that provide equal fair shares of those services to Title I recipients. *They* [*New Jersey*] *will have to find the money to pay us back out of some other place, some other program, some other appropriation.*
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> * * *
>
> *It might well come from a special appropriation to pay a debt to the United States and it need not come out of any currently operated program.* (Emphasis added) (Pa575 to Pa576; Vol. IV of Appendix submitted on behalf of Petitioner, State of New Jersey, in the Third Circuit).

Furthermore, although the Department asserts, in its brief, that no efforts were undertaken to establish the "method of repayment" by New Jersey following the May 7, 1980 Final Determination, this assertion simply ignores the facts of this case (Pet. B. 21; Pet. B. 11 n.19). By letter dated May 23, 1980, the New Jersey Commissioner of Education was informed that "your check in the amount of $1,031,304 must be sent immediately" to the Financial Management Division of the United States Department of Education. Further, if the Commissioner's check did not reach that office within 30 days, he was informed that "interest will be assessed at a rate of ¼ of 1%, or $7,734.78 for each thirty days or fraction thereof, beginning thirty days from the date of this letter" (R.N.J. App. 1a).

priation which, if enacted, could force a reduction in other essential services supported by State funding. Another method of repayment, no less onerous, would be to deduct the money owed the Department from the State aid account for public education in New Jersey. Since there would be no basis to reduce the State aid distributed to other school districts, this reduction would have to be made from that designated for the Newark school district. The exercise of this particular option might well have a devastating impact on the Newark educational system which, of all the districts in New Jersey, relies most heavily on State Aid to fund a "thorough and efficient" system of public education as required by the Education Clause of the New Jersey Constitution. N.J. Const., art. VIII, § IV, par. 1. Indeed, any reduction in the State Aid provided this district could render it incapable of maintaining a constitutionally sufficient educational system. See *Robinson* v. *Cahill*, 69 N.J. 448, 467, 355 A.2d 129, 139 (1976); Public School Education Act of 1975, c. 212, P.L. 1975, N.J.S.A. 18A:7A-1 *et seq.* An equally disruptive alternative by which New Jersey could repay the $1,031,304 would be the deduction of that amount from the operational account of the New Jersey Department of Education. Since the entire departmental operating budget for fiscal year 1983 was $32,791,147, a reduction of this magnitude would seriously impede the State's ability to provide essential support services to school districts throughout the State and would hamper the State's ability to assure the quality of the statewide system of public education. See, General Appropriations Act, c. 49, P.L. 1982, eff. June 30, 1982. This drastic reduction of educational services at the State level would similarly raise serious questions as to the State's ability to discharge its responsibilities under the "thorough and efficient" Education Clause of the New Jersey Constitution.

Furthermore, this Court has recognized the uniquely State and local nature of the responsibility for public education. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).[16] The repayment sanction would, therefore, not only invade the State appropriations process but would undercut the ability of the State, within the context of available appropriations, to fiscally sustain a "thorough and efficient" statewide system of public education. A much less intrusive sanction, one extant under Title I during the period of the Newark audit, was the prospective withholding of Title I grant moneys. If the Department were to withhold future grant moneys, to the extent of any moneys

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[16] Indeed, even the legislative history of the 1978 Amendments reiterates the concern that control of educational decision-making remain with the States and local governmental agencies.

> It must always be remembered that education is primarily the responsibility of States. The Congress has enacted measures to stimulate and encourage the development of programs to improve achievement of students in targeted areas of particular national concern. And States are authorized and encouraged to organize, coordinate, and supervise State and Federal programs within the State in any way that will best carry out the intent of these statutes enacted by Congress. But, nothing in any of these statutes should be construed to discourage coordination of State and Federal programs [H.R. Rep. No. 1137, 95th Cong., 2d Sess. 142, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5112].

See *Wheeler* v. *Barrera*, 417 U.S. 402, 416-417 (1974).

found to be "misspent" or "misapplied"[17] the Federal Government would be made whole. Disadvantaged children, the intended beneficiaries of Title I programs, would not be harmed, since the State would be required to maintain a certain level of funding in accordance with Title I requirements. However, the State would be permitted the discretion to adjust its expenditures prospectively to meet that federal shortfall and, as importantly, provided the time to plan wisely. Most significantly, under the withholding sanction, the State would not be ordered to make an appropriation—a State legislative decision which is fundamental to the concept of sovereignty.

The Department, however, refused to exercise the less obtrusive sanction of withholding and attempted to force the State to appropriate moneys to satisfy an alleged debt owed to it. The Department is, therefore, endeavoring to regulate the "States as States." The command is addressed to an arm of State Government in its capacity as a governmental entity. As the Court has recently recognized "having the power to make decisions and to

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[17] The Department's brief is replete with references to the moneys "misspent" or "squandered" by the State and suggests that the State was "unjustly enriched" by these Title I moneys (Pet. B. 6 n.11; Pet. B. 32; Pet. B. 41). The State, however, has never conceded the correctness of the underlying audit determinations but has vigorously pursued its substantive challenges to these findings within the administrative proceeding and before the Third Circuit. The Court below declined to reach these substantive issues since it concluded that the Secretary of Education was without authority to order New Jersey to repay Title I moneys expended during the 1970-71 and 1971-72 school years. There has, therefore, been no adjudication that Title I moneys were "misspent" or "misapplied" in the Newark Title I program for those years. In fact, should it become necessary to address these issues, the State remains confident that it will prevail on the merits, as well it should, given the admittedly pervasive disadvantaged status of the Newark populous.

set policy is what gives the State its sovereign nature." *Federal Energy Regulatory Comm'n* v. *Mississippi*, —— U.S. ——, ——, 102 S.Ct. 2126, 2138 (1982).

The management of the State budget is clearly an essential and traditional governmental function and since the sanction of repayment was not considered when the State grantees entered the program, the State was deprived of the opportunity to decide whether to participate and was also precluded from structuring the budget in such a way as to allow for the payment of these funds. If the Department were permitted to collect from the limited resources of the State and thereby reduce its ability to attend to the numerous educational problems in the State, the State would be impeded from discharging its essential governmental functions efficiently and effectively.

In a situation closely analagous to the present controversy, the Second Circuit, in *New York State Ass'n. for Retarded Children* v. *Carey*, 631 F.2d 162 (2d Cir. 1980), analyzed the power of a federal court to interfere with an appropriation decision of a State legislature. In that case, a consent decree was entered into whereby Governor Carey agreed to make specific requests to the State Legislature for a review panel to improve conditions for the mentally retarded residents of a state institution. The State Legislature refused to provide the necessary funds for the panel. *Id.* at 163. The Second Circuit reversed a district court order holding Carey in contempt and stated:

> . . .[A] federal district court ought not to put itself "in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money, . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters." In the face of constitutional viola-

> tions at a state institution, a federal court can order the state either to take the steps necessary to rectify the violations or to close the institution. But that remedy leaves the question of the expenditure of state funds in the hands of the citizens of the state, not in the hands of federal judges [*Id.* at 165 (citations omitted)].

At a minimum, States must be permitted to knowledgeably agree to limit their discretion regarding internal fiscal economy and the provision of uniquely State services. That ability would be denied to New Jersey if the Department were permitted to impose a repayment sanction when the statute in place at the time the present grant agreements were entered into contained no such sanction. All New Jersey seeks is to strike a balance between competing federal and state interests. That balance is fairly struck by holding the Department to the single express remedy included in the Title I statutory scheme—the withholding of future payments of Title I moneys.

The Department obfuscates these important considerations by oblique references to the Federal Government's "inherent right" to recoup funds "erroneously or illegally paid out" (Pet. B. 15 to Pet. B. 17). However, none of the cases relied upon by the Department is instructive on the issue herein: whether the Department can order New Jersey to repay Title I moneys allegedly expended in a manner inconsistent with Title I requirements. Blind reliance on the concept of a right to "recoup" misspent grant moneys is meaningless here. The right to be made whole—if moneys, in fact, are shown to have been misspent—is not at issue; rather it is the manner of recoupment that is the heart of this controversy. New Jersey contends that it is inappropriate for the Department to demand repayment of Title I moneys without express and unambiguous language

in the congressional enactment of Title I, during the audited period, conferring that right upon the Department. The right of prospective withholding of funds, that is a setoff against future Title I funds, is specifically established and is not disputed. Nevertheless, the Department persists in confounding the controversy by posturing this appeal as if this nonissue were in fact the seminal issue.

The cases cited by the Department say no more than that the Federal Government has the right to setoff, generally available to creditors, enabling it "to apply the unappropriated moneys of the debtor, in his hands, in extinguishment of the debts due to him." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947). Cases supporting the proposition are legion. See, *e.g.*, *Grand Tru k Western R. Co.* v. *United States*, 252 U.S. 112, 121 (1920); *Wisconsin Central R. Co.* v. *United States*, 164 U.S. 190, 211 (1896); *United States* v. *Carr*, 132 U.S. 644, 650-651 (1890); *United States* v. *Burchard*, 125 U.S. 176, 180 (1888); *McKnight* v. *United States*, 98 U.S. 185, 186 (1879); *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841). Most importantly, these cases cited by the Department do not support the alleged right to demand repayment.

The only cases cited by the Department which are relevant to the issue of repayment undermine its contention that it has the right to demand repayment within the context of an administrative proceeding. In *United States* v. *Wurts*, 303 U.S. 414 (1938) and *United States* v. *Bank of Metropolis*, 15 Pet. 377 (1841), this Court recognized that the Federal Government may sue before a court of competent jurisdiction to recover funds wrongfully or erroneously paid; it emphasized, however, the need for a court to pass upon the government's claim. No such judicial proceeding has been initiated by the Department in the present matter. Furthermore, the statements in *Wurts*, suggestive of

a right to recoup an erroneous tax refund by suit to compel repayment, are merely *dicta*. The issue in that case focused upon the commencement of a limitations period for the Federal Goverment to recover an erroneous tax refund. Moreover, *Wurts* did not involve an attempt to obtain repayment from a sovereign State in the context of a grant agreement which, at the time entered into, provided the State with no notice that the sanction of repayment was available to the Federal Government. Indeed, none of the cases cited by the Department to support its claimed power to order New Jersey to repay Title I moneys within the context of an administrative proceeding, involved a sovereign State. Rather, they involved private individuals, *United States* v. *Burchard, supra; Gratiot* v. *United States, supra; McKnight* v. *United States, supra,* or commercial enterprises or entities, *Grand Trunk Western R. Co.* v. *United States, supra; Wisconsin Central R. Co.* v. *United States, supra; United States* v. *Bank of Metropolis, supra.* This critical difference precludes the Department from utilizing these cases to support its purported authority to order the State of New Jersey to repay $1,031,304 in Title I moneys, particularly when that order issues not from a court of competent jurisdiction but from an administrative tribunal.

The Department's reliance upon *Mount Sinai Hospital of Greater Miami, Inc.* v. *Weinberger,* 517 F.2d 329 (5th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976) is similarly misplaced. In the first instance, *Mount Sinai* simply stands for the proposition that the Federal Government may seek to recoup Medicare payments improperly spent by non-governmental entities by means of offset or may pursue, in the courts, an action to require repayment of said funds. See *United States* v. *Bank of Metropolis, supra; United States* v. *Wurts, supra.* Secondly, and more importantly for this matter, *Mount Sinai* provides

no guidance on the proper balance between the Federal Government and the States regarding sanctions which may be legitimately imposed upon the States in the context of a grant agreement. The same failure to address federal-state considerations requires rejection of lower court decisions cited by the Department together with *Mount Sinai* (Pet. B. 17, n.20). *Cf. West Virginia* v. *Secretary of Educ.* 667 F.2d 417 (4th Cir. 1981) (Considerations of federal-state relations and legitimate exercises of power over sovereign States apparently not raised and not considered by Fourth Circuit in reaching its decision).

Indeed, the decision in *California* v. *Block,* 663 F.2d 855 (9th Cir. 1981) is much more responsive to the issues presently before this Court. In that case, the Federal Government, absent express statutory authority, sought to impose the sanction of repayment against the sovereign State of California. The Ninth Circuit recognized that for a sanction to be utilized against a State, that sanction must voluntarily and knowingly be accepted by the State as part of its acceptance of the "contract" entered into with the Federal Government pursuant to an exercise of the spending power. *Id.* at 858-859, n.3. In *Block,* as in the instant matter, the Federal Government attempted to impose sanctions against a State which were inconsistent with the statutory scheme enacted pursuant to the spending power and accepted by the State at the time it agreed to participate in the grant-in-aid program. The Federal Government's attempt to alter the federal-state agreement was rebuffed by the Ninth Circuit and the Department's similar attempt herein should also be rejected.

B. To allow the Department to require New Jersey to pay back moneys expended in the Newark school district during the 1970-71 and 1971-72 school years by retroactive application of the sanction of repayment, first included in the 1978 Amendments, offends basic principles of statutory construction.

During the period at issue here, two statutory sources provided for the sanctions available to the Department in the event a participating State or local school district was found to be in substantial noncompliance with the requirements of Title I. 20 U.S.C. §§ 241, 1232(c) (1974). Both provided solely for the prospective withholding of funds and contained no reference, express or implied, to repayment of amounts expended on educational programs for disadvantaged children but subsequently disallowed by audit finding. *Ibid.* Since this power to order repayment of Title I funds was not specifically made one of the terms and conditions of the grant agreement until 1978 (Pub. L. 95-1561, 92 Stat. 2190 (1978) (codified at 20 U.S.C. § 2835(b) (1982 Supp.) see also, Pub. L. 95-561, 92 Stat. 2347 (codified at 20 U.S.C. § 1234(a) (1982 Supp.)), New Jersey never had the opportunity to knowledgeably consider the ramifications of this power when it voluntarily gave its consent to participate in the Title I program in 1970 and 1971.

Nor could such a power be reasonably inferred from the statutory scheme during that period.[18] Congress had un-

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[18] The Department's reliance upon the Federal Claims Collection Act, 31 U.S.C. § 951 *et seq.* to support its claimed right to demand repayment is misplaced. By its very terms, the Act professes neither to increase nor diminish an agency head's authority to litigate claims. 31 U.S.C. § 953. Those methods are set by the terms of the statutory scheme in question, here Title I. The terms of the Federal Claims Collection Act precludes interpreting that Act as augmenting the powers conferred upon agency heads.

ambiguously presented, in 20 U.S.C. §§ 241 and 1232(c) (1974), to the Federal Government and to participating State and local governmental entities the sanctions for substantial noncompliance which were to become part of the intergovernmental agreement. There was no hint therein of an implied additional and harsher penalty of repayment. Neither is there any reasonable inference of such a power in the legislative history of the Title I statute available at the time New Jersey entered into the Title I program for the 1970-71 and 1971-72 school years.

The Department, however, has attempted to ground the existence of this sanction upon the following language in the Senate Report on Pub. L. 91-230:

> RECORDS AND AUDIT
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> The language of section 425 is based on a recommendation of the Comptroller General respecting retention of records and audits relating to education programs.
>
> Audit reports on Title I of the Elementary and Secondary Education Act have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of Title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to be well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer [S. Rep. No. 634, 91st Cong. 2d Sess. 58-59, *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 2826-2827].

However, the Third Circuit correctly understood the reference to Section 425 under "Records and Audit" to be a typographical error, the correct reference being to Section 424 (Pet. App. 16a). The Third Circuit's reading of that portion of the legislative history is borne out by the section-by-section analysis of the amendatory legislation appearing subsequently in the legislative history which provides in pertinent part:

> Section 424. Records and audit. — This section sets forth the basic recordkeeping and audit requirements for education programs.
>
> Subsection (a) of section 424 requires that each recipient of funds from a grant or contract under any applicable program keep such records as the Commissioner shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant or contract is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.
>
> Subsection (b) of section 424 provides that the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipients that are pertinent to the grant or contract received under any applicable program.
>
> Section 425. Payments—This section provides that payments pursuant to grants or contracts under

> any applicable program may be made in installments, and in advance or by way of reimbursements, with necessary adjustments on account of overpayments or underpayments, as the Commissioner may determine [S. Rep. No. 634, 91st Cong., 2d Sess. 133, *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 2901].

In Section 424, Congress merely intended to assure a continual flow of updated information concerning the program to the Department and to Congress. In light of the number of amendments to the statutory scheme, it is at once apparent that Congress relied upon this flow of information to make the program as effective as possible. Moreover, review of this legislative history, does not support the authority of the Department to demand repayment of any costs disallowed by audit. Indeed, if anything concerning this point can be gleaned from the above quoted legislative history, it is that adjustment due to "overpayment" is to occur by alteration of the payment schedule. See analysis of Section 425. 1970 *U.S. Code Cong. & Ad. News, supra,* 2901.

The Department seeks to circumvent this obvious flaw in its position by relying upon two separate but related arguments having as their common focus the provisions in the 1978 Amendements specifically authorizing the Department to demand repayment, from participating States and local governmental entities, on the basis of audit findings. 20 U.S.C. § 2835(b) (1982 Supp.). See also 20 U.S.C. § 1234a (1982 Supp.).

First, the Department asserts that the 1978 provisions authorizing the Department to demand repayment ought to be applied retroactively. This argument was correctly rejected below, the Third Circuit relying, in part, upon the general rule against retroactive application of statutory

enactments as discussed in this Court's rulings in *Greene* v. *United States*, 376 U.S. 149, 160 (1964) and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913). See also *United States* v. *Richardson*, 512 F.2d 105, 106 (3d Cir. 1975).

In its brief on the merits, the Department criticizes the Third Circuit's reliance upon *Greene* contending that this Court ruled against retroactive application of a newly established regulation, in *Greene*, solely because the claimant therein already had an administratively determined right to seek lost wages when the new procedures were adopted and further, that it would be unfair to apply new, more restrictive, standards once a final determination had been made. The Department contends that since there there was no administrative determination regarding entitlement to Title I funds when the 1978 Amendments were enacted, the *Greene* rationale is wholly inapplicable to the present case. The department's analysis distorts the basis of the *Greene* decision.

The claimant in *Greene* was employed by a private corporation involved in classified work for the military. The Department of the Navy revoked this employee's security clearance without a hearing and he was discharged. *Greene* v. *United States*, 376 U.S. at 154. Claimant filed an action for injunctive relief and following a remand by this Court in *Greene* v. *McElroy*, 360 U.S. 474 (1959), the District Court entered a final order that the Secretary of Defense was unauthorized in its revocation of the security clearance. 376 U.S. at 155. Claimant then brought an administrative action for loss of earnings based upon a 1955 Department of Defense regulation. The Department refused to consider the claim under the 1955 regulation but offered to review the matter pursuant to the 1960 regulation, issued after the claim had arisen and after it

had been asserted. Under the 1960 regulation, monetary restitution was conditioned upon pursuance of certain administrative procedures. The Department of Defense argued that the 1960 regulation was applicable and that before restitution is allowed, the claimant must comply with the additional conditions at the administrative level. This Court rejected such contention, stating that:

> Whatever petitioner's rights are, there can be no doubt they matured and were asserted under the 1955 directive. Not until six months after petitioner formally presented his claim to the Department of Defense did the Secretary of Defense issue a new, and substantially revised, regulation concerning "monetary restitution". Thus, the Government's argument necessarily requires that the 1960 regulation be given retroactive application [*Id.* at 160].

The Court then articulated the long-established rule against the retroactive application of a statute and concluded that it would be "unjustifiable to give the 1960 regulation retroactive effect." *Ibid.*

After the Court ruled against the retroactive application of the 1960 regulation, it addressed the issue of whether, pursuant to the 1955 regulation, claimant was entitled to monetary relief. It was only in addressing this issue that the Court considered whether a final administrative determination had been reached. *Id.* at 160-161. Despite the Department's assertions to the contrary, (Pet. B. 38 n.49), this Court's concern, in *Greene,* with whether a final administrative determination had been made, had no bearing upon its decision to apply the rule against the retroactive application of a new regulation. See also *Claridge Apts. Co.* v. *Comm'r of Internal Revenue,* 323 U.S. 141, 164 (1944) ("Retroactivity, even where permissible, is not

favored, except upon the clearest mandate."). Retroactive application is especially inappropriate where as in *Greene* and *Claridge*, additional burdens rather than benefits are concerned. *See Claridge Apts. Co.* v. *Comm'r of Internal Revenue, supra*, 323 U.S. at 164.

Generally, a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974). The concerns relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Id.* at 717.

The legislative history of Public Law 95-561 which encompasses both provisions of the 1978 Amendments which grant power to order repayments, reflects a Congressional understanding of the need to make pre-1978 Title I requirements more understandable. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 41-56, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5011-5026. The legislative history of the 1978 Amendments underscores their purpose of augmenting the flexibility available in the operation of local programs. *Id.* at 4972. The legislative history, however, reflects no Congressional intention to mandate retroactive effect of the statutes authorizing the Commissioner to demand refunds. The impropriety of giving the refund provisions retroactive application, in such circumstances, is evident when the factors in *Bradley* are considered.

The first two factors under the *Bradley* analysis focus upon the nature of the parties involved and their rights. Here the rights of a sovereign State are at stake. As fully discussed *ante* in Subpoint A, a State, when it enters into a voluntary agreement with the Federal Government, is en-

titled to know, with precision, the terms and conditions of the agreement in order that its consent may be knowledgeable and voluntary. That right should not be eliminated by the retroactive modification of that agreement by Congress. However, in the present matter there is no evidence that Congress intended a result which would be disruptive of the balance between legitimate Federal and State interests. In this context, it is submitted that, under *Bradley*, retroactive application of the repayment sanction would be impermissible.[19]

The Department's second but related argument in this regard is that the legislative history surrounding the 1978 Amendments suggests that Congress believed the power to demand repayment of allegedly misspent Title I funds was implied in the earlier versions of Title I. However, the Department fails to appreciate that it is contrary to established law regarding exercises by Congress under the spending power for Congress to regulate the States

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[19] 20 U.S.C. § 2835(b) specifically requires the enactment of procedures by the Commissioner of Education for repayment if such a sanction is to be utilized:

> The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. . . . Where, *under such procedures,* the audit resolution process requires the repayment . . . (emphasis added).

The Commissioner did not adopt procedures until "interim final form" regulations were published in 44 Fed. Register 30528, May 25, 1979. The final rules and regulations were not published until April 3, 1980, and thereafter Congress disapproved them. H. Con. Res. 318, 96th Cong., 2d Sess. (1980). The Panel's determination below, therefore, was rendered pursuant to ineffective or invalid rules and regulations. Thus, it cannot be said that the process "under such procedures" required the repayment of Federal funds.

in any manner other than by clear, unambiguous and, as a necessary counterpart, express language. There is no such clear, unambiguous statement here.[20]

Furthermore, in order to find that the power to order repayment was implied in the version of Title I in effect during the audited years, the power would have to be bottomed upon the only statutory sections in effect which related to sanctions. The prospective withholding section would have to be understood as supporting such an implied power.[21] However, that position is belied by Congress' reenactment of the withholding section concurrently with the first enactment of the repayment section. Compare 20 U.S.C. § 1234b and 20 U.S.C. § 2836 with 20 U.S.C. § 1234a and 20 U.S.C. § 2835. As the Third Circuit correctly concluded, it would "not only be ascribing to Congress a useless act in enacting Section 185 [20 U.S.C. § 2835], but would be construing the Act to con-

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[20] Indeed, Congress has had no difficulty explicitly providing for such a sanction when it has desired to do so. See 20 U.S.C. § 646(d) (1974 Supp.); 20 U.S.C. § 954(h) (1974 Supp.). See also 20 U.S.C. § 241-1(c) (1974 Supp.). For an instructive listing of examples where Congress has seen fit to expressly authorize a repayment sanction, see 2 R. Cappalli, *Federal Grants and Cooperative Agreements*, § 8.14 (1982).

[21] Such power could not be implied under 20 U.S.C. § 884, which was enacted in 1974, because this section does not constitute a grant of power but rather a limitation of power. Indeed, 20 U.S.C. § 884 does not address the method of recovery. It merely limits the period for which recovery may be had and must be read *in pari materia* with the two existent provisions delineating the method of recovery which was by prospective withholding. 20 U.S.C. §§ 241, 1232(d). Nor does the legislative history to 20 U.S.C. § 884 indicate the manner by which the Department may "collect" on an audit exception (Pet. B. 34 n.44). H.R. Rep. No. 805, 93d Cong., 2d Sess. 67-68, *reprinted in* 1974 U.S. Code *Cong. & Ad. News* 4160-4161.

tain plain redundancies" (Pet. App. 18a). Such conclusion is, of course, untenable. This Court is urged to similarly reject this theory of implied power to order repayment.

For all of the foregoing reasons, New Jersey respectfully submits that there is no statutory basis, express or implied, for the Department's assertion of a right to demand repayment of Title I moneys expended in the Newark school district during the 1970-71 and 1971-72 school years.

POINT II

Should the decision below be reversed and the sanction of repayment, first included in the 1978 Amendments, be retroactively applied, this matter should be remanded for an adjudication of those substantive issues raised below but never reached by the Third Circuit with instructions that all sections of the 1978 Amendments be given retroactive effect.

Throughout the pendency of the administrative proceeding, initially before the Title I Audit Appeal Board and later the Education Appeal Board, New Jersey advanced its substantive arguments challenging the Final Audit Determination of the Newark Title I program for the 1970-71 and 1971-72 school years. New Jersey contended that the attendance areas disallowed for funding by the federal auditors were, in fact, eligible for Title I funding; in the alternative, the State argued that the entire Newark school district qualified for designation as a Title I area. These substantive arguments, rejected by the Department of Education in its final decision, were raised before the Third Circuit. In its decision, the Third Circuit found it unnecessary to reach these

issues since it concluded that the Department did not have the authority to issue an order directing New Jersey to repay allegedly misspent Title I moneys (Pet. App. 3a).

Should this Court conclude that the Department was statutorily authorized to order the repayment of Title I funds expended in the 1970-71 and 1971-72 school years, the substantive issues advanced by New Jersey must be resolved before New Jersey is directed to repay any moneys. Where this Court does not have the opinion of the lower court on a particular legal issue, it generally declines to consider that issue remanding it to the court below for resolution. *Middlesex Cty. Ethics Comm.* v. *Garden State Bar Ass'n*, —— U.S. ——, ——, 73 L.Ed.2d 116, 128 n.17 (1982); *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975). This is especially so where the resolution of those issues will require the Court to consider *de novo* complex factual presentations. In the present matter, the unresolved issues involving the correctness of the underlying audit determinations should be remanded to the Third Circuit for adjudication.

Of course, the remand of these substantive issues would only be required if this Court retroactively applies the sanction of repayment of Title I moneys, included for the first time in the 1978 Amendments, to Title I moneys expended in the Newark school district during the 1970-71 and 1971-72 school years. In the event that this sanction is so applied, those aspects of the 1978 Amendments which would impact upon the eligibility of attendance areas should, in fairness, also be given retroactive effect.

In this case, those provisions include Section 101(a) of Pub. L. 95-561, 92 Stat. 2161, which sets forth the qualifications for Title I eligiblity for a school attendance area:

> A local education agency may designate any school attendance area in which at least *25%* of the children are from low-income families as an eligible school attendance area . . . [20 U.S.C. § 2732(a)(1) (emphasis added)].

The purpose of including this low-income percentage which qualifies a school attendance area for Title I funding without reference to the district-wide level of poverty, was to eliminate an anomaly in the then existing statute, its implementing regulations and departmental practices. Indeed, this provision stemmed from the concern, expressed in the House Report, that an:

> . . . inflexible targeting requirement could force *some school districts with very high incidence of poverty to declare schools with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income or less might be eligible in wealthier neighboring districts* [H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in* 1978 *U.S. Code Cong. & Ad. News,* 4992 (emphasis added)].[22]

It was precisely this situation which prevailed in Newark during the period of the Title I audit. For the 1971-72 school year, Newark had a district-wide percentage of children from low-income families of *33.9%*.[23] Pursuant to the

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[22] See the Joint Explanatory Statement of the Committe of Conference indicating that by Senate amendment, the minimum percentage was raised to 25% and it is that minimum which was enacted in Section 101(a) of Pub. L. 95-561. H.R. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 255, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5158.

[23] The Title I applications submitted by the Board of Education for the City of Newark for the years following the federal audit show that the district-wide percentage of children from low-income families has ranged from 41% to 61%.

federal auditors' recalculations, ten school attendance areas in Newark were declared ineligible for Title I funding even though these areas had low-income percentages ranging from 27.9% to 33.5%. Even assuming the appropriateness of these recalculations, which New Jersey does not, it is clear that the only basis for disqualifying these attendance areas is their location within Newark, a school district with extraordinarily high incidences of poverty. Had these ten attendance areas been located within almost any other school district in the nation, they would have qualified for Title I funding. It was to correct this inequity, exacerbated by the Department's harsh construction of its implementing regulations, that 20 U.S.C. § 2732(a)(1) was enacted.[24] Should this Court, therefore, determine to retroactively apply the sanction of repayment of Title I funds, it should similarly give retroactive effect to the less stringent standards of Title I eligiblity contained in the 1978 Amendments. To do less, would impose upon New Jersey the additional burdens contained in the 1978 Amendments while, at the same time, denying the State its benefits.

In sum, should the decision of the Third Circuit, finding the Department without authority to order the State of New Jersey to repay Title I moneys expended in the 1970-71 and 1971-72 school years, be reversed, then it is

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[24] This inequity was compounded by the Department's refusal to designate the entire Newark school district as a Title I area. Ironically, Newark was found to be ineligible for district-wide designation, by the Department, because of its high incidence of poverty which pervaded it in its entirety, not because there were pockets of wealth. Since certain school attendence areas in Newark had percentages of low-income children as high as 80%, while one area was 10% — hardly a wealthy area — the Department concluded that such "wide variances" in concentrations of poverty rendered it ineligible for district-wide designation as a Title I area.

respectfully submitted that this matter should be remanded for an adjudication of those substantive issues raised below but not reached by the Third Circuit. It is further requested that a remand be accompanied by instructions that the Third Circuit, in adjudicating these substantive issues, give retroactive effect to all sections of the 1978 Amendments to the Elementary and Secondary Education Act.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit, concluding that the Secretary of Education is without authority to order the State of New Jersey to repay Title I moneys received under federal grants in 1970 and 1971, should be affirmed. Should the decision below be reversed, this matter should be remanded, with appropriate instructions, to the Third Circuit for an adjudication of those substantive issues which, although advanced by the State of New Jersey in its Petition for Review, were not reached by the Court below.

Respectfully submitted,

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Dated: February 14, 1983

APPENDIX

Correspondence Concerning Repayment of Title I Funds by State of New Jersey to United States Department of Education

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of Education
Washington, D.C. 20202

May 23, 1980

Honorable Fred G. Burke
Commissioner of Education
State Department of Education
Trenton, New Jersey 08625

Dear Commissioner Burke:

Reference is made to the U.S. Department of Education Audit Number 02-50006 and the letter of May 7, 1980, from the U.S. Department of Education Appeal Board. The decision of the Education Appeal Board is final, therefore your check in the amount of $1,031,304.00 must be sent immediately to:

U.S. Department of Education
Financial Management Division
Accounts Receivable Section Room 3085
400 Maryland Avenue, S.W.
Washington, D.C. 20202

If your check does not reach this office within thirty days, interest will be assessed at a rate of ¾ of 1%, or $7,734.78 for each thirty days or fraction thereof, beginning thirty days from the date of this letter.

Correspondence Concerning Repayment of Title I Funds by State of New Jersey to United States Department of Education

If additional information is desired, please contact James Sturdivant, Accounts Receivable Section, on (202) 245-8318.

Sincerely,

John A. Murphy, Chief
Fiscal Services Branch
Financial Management Division

Office - Supreme Court, U.S.
FILED
FEB 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2126

In The

Supreme Court of the United States

October Term, 1982

T.H. Bell, Secretary of Education,
Petitioner

v.

State of New Jersey

T.H. Bell, Secretary of Education,
Petitioner

v.

Commonwealth of Pennsylvania

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT COMMONWEALTH OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether in implementing statutes with express enforcement provisions federal agencies nevertheless have inherent or implied power to require states to reimburse the federal treasury for funds expended in the operation of a grant program.

2. Whether the enforcement provisions enacted in the Education Amendments of 1978, which have been superseded by more recent law, can be applied retroactively to sanction grant programs conducted between 1970 and 1973.

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United States v. Hadden, 192 F.2d 327 (6th Cir. 1951)	28
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Miscellaneous:	
Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 Am. U. L. Rev. 279 (1979)	29
2 R. Cappalli, Federal Grants and Cooperative Agreements (1982)	8, 29

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H.R. Rep. No. 1814, 89th Cong., 2d Sess. 5, *reprinted in* [1966] U.S. Code Cong. & Ad. News 3847 6

H.R. Rep. No. 93-805, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4154-55 40

Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor, 96 Cong., 2d Sess. 32 (1980) 18

Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979) 38

Note, *Federal Grants and the Tenth Amendment: "Things As They Are" and Fiscal Federalism*, 50 Fordham L. Rev. 130 (1981) 8

Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 Yale L.J. 1694 (1981) 29

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S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2532-36 ..... 34, 35

S. Rep. No. 91-634, 91st Cong., 2d Sess. (1974) 19

S. Rep. No. 97-378, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. Code Cong. & Ad. News 3378-79 35

2 A. Sutherland, Statutory Construction (4th ed. 1973) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2125

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner

v.

STATE OF NEW JERSEY

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT COMMONWEALTH OF PENNSYLVANIA

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. §§ 241a-241m (1974), and pertinent regulations issued thereunder, 45 C.F.R. § 116 (1972); the General Education Provisions Act, Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970); the Education Consolidation and Improvement Act of 1981, 20 U.S.C.A. §§ 3801-3876 (Supp. 1982); and the Debt Collection Act of 1982, Pub. L. No. 97-365, § 10(2), 96 Stat. 1754-55 (1982), are reprinted in the Appendix, *infra*, 1a-13a.

STATEMENT

In this case, an administrative agency is asserting that it has inherent power, independent of any statutory authority, to require state grant recipients to pay a financial penalty for past programs with which the agency, in retrospect, is not satisfied. The case arises in the context of the Title I [1] grant program administered during the relevant period by the Office of Education (OE or agency) of the Department of Health, Education, and Welfare (HEW).[2] At issue are the Title I programs conducted by local school districts, called Local Educational Agencies (LEAs), in Pennsylvania between 1970 and 1973 which HEW auditors took exception to as having failed to com-

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[1] Title I of the Elementary and Secondary Education Act of 1965 (ESEA) is currently codified, as amended, at 20 U.S.C.A. §§ 2701-2854 (Supp. 1982). Because the programs at issue in this case were conducted between 1970 and 1973, and, due to frequent amendment, the Title I statute in effect during those years contains some significant differences from the present law, much citation in this brief will be to the law in effect at the time. The Title I statute in the form it took during those years is still codified at 20 U.S.C.A. §§ 241a-241m (1974), in the unsupplemented volume. For ease of reference, this brief will cite to that volume and to the appendix of this brief where the relevant portions of the law are set out verbatim. Appendix to Brief of Respondent, Commonwealth of Pennsylvania (Pa. App.) 1a through 13a.

Effective October 1, 1981, Title I was replaced by Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA), 20 U.S.C.A. §§ 3801-3807, 3871-3876 (Supp. 1982). Except for provisions enumerated in § 3803(a), (b) of the ECIA, Congress specifically directed that the provisions of Title I are not applicable to the Chapter 1 program. 20 U.S.C.A. § 3803(c) (Supp. 1982).

[2] OE was predecessor to the present Department of Education, and was a division of HEW. OE was headed by the Commissioner of Education. On May 4, 1980, OE's responsibilities were transferred out of HEW to a newly created Department of Education and the powers previously exercised by the Commissioner were assumed by the new Secretary of Education. 20 U.S.C.A. §§ 3411, 3441 (Supp. 1982). Because all substantive matters affecting this case occurred prior to the establishment of the Department of Education, references will be to OE and the Commissioner.

ply with their interpretation of technical regulatory requirements.

Title I was enacted in 1965 to provide grants to LEAs to meet the special educational needs of children residing in low-income areas, and to defuse the impact that concentrations of low-income families have on the ability of LEAs to support adequate educational programs, by financing the expansion and improvement of their programs. 20 U.S.C.A. § 241a. At the time of Title I's passage, Congress was deeply concerned about the adverse effect of poverty on educational development. It was the prevailing belief in Congress that education was the key that would free disadvantaged children from the cycle of poverty. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1450.

Congress proposed to achieve its goals by establishing programs at the school district level that would be designed specifically to reach those in the school population where poverty impeded learning. The theory was that people from poverty stricken areas had failed to benefit from the regular educational system because educational programs were generally aimed at the achieving student and overlooked the special needs created by poverty. By encouraging programs that would be aimed solely to reach that previously neglected population, Congress hoped to achieve a more effective education with all its attendant advantages for a broader range of Americans. *Id.* at 1454.

As was noted by the Third Circuit, Title I is unique in its attempt to affect education at the local level throughout the country. Pet. App. 5a-7a, 17a. Education has historically been controlled at the local level and imposing federal goals on widely diverse localities to achieve a national purpose is a delicate operation. In order to preserve the structure and value of local control, Congress devised a system whereby the grant would be made to the State Educational Agency (SEA) to be distributed to

LEAs which had received approval from the SEA of their application for funds.

Although the SEA was responsible for fiscal control and fund accounting procedures to assure proper disbursement, and for initiating procedures to assure that the LEAs were using the money for approved programs,[3] the programs themselves were to be left to the discretion and judgment of the LEAs in order to accommodate diversity. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1454. In practice, the Title I program has been paid in advance, as opposed to being paid by way of reimbursement, with grant funds being made available to the LEAs prior to the commencement of the school year.[4] This is consistent with the Act's purpose to assist areas where high concentrations of poverty render a school district especially limited in its capacity to provide additional or specialized programs.

Since it was unknown what would be effective in reaching the target population, Congress encouraged flexibility,

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[3] S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1453. Also, the SEA was required to provide assurances to the Commissioner according to 20 U.S.C.A. § 241f, Pa. App. 1a. Title I was the only ESEA program without the requirement of a state plan.

[4] The significance of the difference between an advance-funding scheme and payment by way of reimbursement for services already rendered is discussed in the Third Circuit's Opinion. Pet. App. 21a, 22a. In a reimbursement program, use of setoff against program funds held by the agency does not affect either the grant recipient's budget or the beneficiaries' program. In other words, because the setoff is against future program funds, no expenditures outside the program's coverage need be made. In contrast, setoff against an advance-funded program, or even an advance installment payment as in Title I, 45 C.F.R. § 116.43(b) (1972), requires expenditures from a grant recipient's own treasury to prevent a cut-back or failure of the program during the year for which the funds were intended. Obviously, this destroys Congress's objectives in its program.

innovation, and creativity in the programs. *Id.* at 1454-56. In connection with this experimental approach, Congress provided for evaluation of the programs to monitor their effectiveness and to provide a basis for future adjustment both by Congress and the program administrators. *Id.* at 1459. It is quite clear from the legislative history that Congress expected Title I to be around for a long time to accomplish its purpose. Future adjustments to the program were anticipated as was the need to pay close attention to such factors as program results and developing educational theories.

The enforcement scheme established to ensure compliance with the requirements of the Title I statute was consistent with the purpose and direction of Title I. Remedies were structured into the Title I statutory scheme which permitted the exercise of control over the programs without jeopardizing them or limiting their effectiveness. This enforcement scheme gave the Commissioner authority to disapprove an application for grant funds submitted by the SEA [5] or to withhold funds when, after notice and hearing, he finds a failure to comply substantially with Title I requirements. 20 U.S.C.A. § 241j, Pa. App. 2a. Funds may only be withheld under this provision, however, until the Commissioner is satisfied that there is no longer such failure to comply. This is a particularly compelling remedy: it forces a grant recipient to bring its program into line or lose it.

There is no provision in the statute requiring the reimbursement of the United States Treasury for grant funds that were expended on Title I programs. Title I was amended frequently—every other year—but it was not until 1978 that Congress added the penalty of repaying misspent or misapplied grant funds based on audit exceptions. 20 U.S.C.A. § 2835 (Supp. 1982). The frequent amendments to Title I were made pursuant to re-

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[5] 20 U.S.C.A. § 241f, Pa. App. 1a.

evaluations of the program based on regular reports and in fulfillment of Congress's original intention to review the program design completely before continuing it. H.R. Rep. No. 1814, 89th Cong., 2d Sess. 5., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3847.

No regulation was ever promulgated by OE in support of its assumption of powers outside the statute. At the time the audits of Pennsylvania's Title I program were conducted and at the time the demand for refund was issued by OE, the agency was subject to statutory controls pertaining to generally applicable requirements prescribed by the Commissioner. The General Education Provisions Act (GEPA)[6] required regulations to be published in the *Federal Register*[7] with citation to the legal authority upon which they were based[8] before they could take effect. The agency was also admonished by statute to enforce its regulations uniformly throughout the states. 20 U.S.C.A. § 1232(c).

Despite the concern apparent in the statute that the agency act with authority and control, the agency set upon a course of conduct directed to enforcing its demand for reimbursement of expended grant funds without the authority of either statute or regulation. It gratuitously formed the Title I Audit Hearing Board in late 1972 to hear audit disputes. The hearing board was never formally established by regulation but was simply announced in a Notice published in the *Federal Register*, 37 Fed. Reg. 23,002 (1972), thereby avoiding the inconvenience of following rule-making requirements. Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970), § 421, *as*

[6] GEPA is applicable to Title I. 20 U.S.C.A. § 1221(b). Citations to GEPA are to the 1978 volume of U.S.C.A., not the supplement, since the version of the law contained therein more closely reflects the provisions in effect during the period the subject programs were in operation.

[7] 20 U.S.C.A. § 1232(b)(1).

[8] 20 U.S.C.A. § 1232(a)(2).

amended 20 U.S.C.A. § 1232 (Supp. 1982), Pa. App. 6a. The Notice pertaining to the hearing board was later amended by another Notice, 41 Fed. Reg. 28,568-69 (1976), which was made applicable to proceedings in progress at the time. No authorizing regulations ever empowered this board to act. The first validly promulgated regulations on the subject of reimbursement of federal grants and procedures to implement such a penalty appeared in 1981,[9] subsequent to the Education Amendments of 1978 which contained a provision authorizing the repayment penalty. 20 U.S.C.A. § 2835 (Supp. 1982).

In 1972, prior to the conclusion of the programs in question and well before the first audit report was issued, GEPA was amended to limit the authority of OE to the express terms of its authorizing statute.[10] Congress's continuing concern that OE was assuming powers for itself far beyond the statutory boundaries was reflected in the 1974 amendments to GEPA. These amendments clarified more details with respect to publication of agency rules and required the submission of final regulations for congressional review before such regulations could become effective and enforceable. 20 U.S.C.A. § 1232(b)(2), (d) through (g). It is clear that Congress was becoming more and more concerned to maintain close control of the agency designated to enforce its programs.

Pennsylvania has participated in the Title I program since its inception. As in any state, participation in Title I is not without cost to the grant recipient. Al-

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[9] 46 Fed. Reg. 27,304 (1981).

[10] "The Office of Education shall not have authority which is not expressly provided for by the statute or implied therein." Pub. L. No. 92-318, § 403(a), 86 Stat. 327 (1972). This section was later amended to read: "The Office shall have such responsibilities and authorities as may be vested in the Commissioner by law or delegated to the Commissioner in accordance with law." 20 U.S.C.A. § 1221c(a).

though federal grants may be popularly viewed as largesse, to receive the benefits the state grantee must comply with various mandates of federal law resulting in substantial expenditures beyond the simple administration of the program. *See* Note, *Federal Grants and the Tenth Amendment: "Things as They Are" and Fiscal Federalism*, 50 Fordham L. Rev. 130, 135, 148 (1981); 2 R. Cappalli, Federal Grants and Cooperative Agreements, § 11:11 at 23 (1982). One costly provision in Title I is the requirement that eligibility for Title I funds demands that the SEA and each LEA continue to maintain fiscal effort. 20 U.S.C.A. § 241g(c)(2). This means that the school district must expend as much money on the program of instruction provided with state and local funds for each year that Title I is offered as it did during each of the preceding two years. Educational expenditures in an LEA are thereby frozen at the highest level they have ever attained for the period of time that Title I programs are offered.

The audit exceptions forming the basis of this case are against programs conducted in four school districts in Pennsylvania commencing with the school year in 1970 through the end of the school year in 1973. Personnel from the audit agency of HEW visited the school districts in 1971 and again in 1973. There they conducted a program review that went considerably beyond any fiscal audit. On the basis of interviews with staff, observation of program operation, review of program design and objectives, studies of demographic data and the like, the auditors subjectively evaluated the program to determine whether its interrelationship with the regular course of instruction violated any program standard established by OE.[11] By this time, OE had promulgated voluminous, detailed and ambiguous regulations channeling and conforming Title I programs into a national

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[11] Annual fiscal audits of LEA expenditures were a required aspect of SEA fiscal control. 45 C.F.R. § 116.48 (1972), Pa. App. 5a.

stereotype.[12] Numerous conflicting pamphlets purporting to direct program design also issued from OE over the period. Any deviation from the standard that the rule sought to define was noted by the auditors as an exception.

Relying on these publications, the auditors visiting the Pennsylvania LEAs found programs which conflicted with their interpretation of two prohibitions: services to ineligible schools and services providing general aid. Initially, two districts were cited for serving ineligible schools. Regulations required specified concentrations of poverty to prove eligibility before Title I services could be offered. 45 C.F.R. § 116.17 (1972). Concentrations of poverty were determined on the basis of data which were often unavailable or out of date. Furthermore, identification of eligible schools was based on estimates. The combination of these factors led one of the school districts in question to make estimates based on sources which the auditors found unacceptable.

The other school district faced with this violation had implemented a districtwide busing system to achieve racial integration. With the distinctions thus blurred between areas with or without concentrated poverty, the school district's attempt to follow the bused children with Title I services by supplying them in their new locations was criticized by the auditors and resulted in an audit exception.

The second prohibition at issue in this case was that against providing Title I services for the general aid of

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[12] For an example of an ambiguous regulation, 45 C.F.R. § 116.17 (1972) titled "Project covered by an application," has been read by the auditors to prohibit the use of grant funds for general aid. Portions of this regulation are set out in Pa. App. 3a. Far from putting an LEA on notice as to what is prohibited by this regulation, the best that can be said is that it does not address the issues raised in a school district which is busing for desegregation, a situation which existed in both the Pennsylvania LEA's that were cited for violation of this regulation.

other students in the school population besides Title I eligible students, rather than concentrating the services exclusively on the eligible students. 45 C.F.R. § 116.17 (1972). Audit exceptions asserting violation of this prohibition named two school districts, one of which was undergoing a massive desegregation effort at the time of its audit. With respect to both of these school districts, the Audit Hearing Board Panel made the same finding: personnel hired to implement the Title I program, although specifically functioning to provide services that benefited the eligible students, did not restrict themselves exclusively to working directly with Title I identified children. The fact that the programs were created to serve the needs of the eligible population and that population was specifically directed to the Title I personnel, and did receive services, did not, in the view of the auditors, compensate for neglecting to isolate the Title I youngsters in an exclusive program.

The special problems these districts faced in isolating their Title I students, particularly in the districts undergoing desegregation, were remarked by the Audit Hearing Board Panel that heard Pennsylvania's case. Pet. App. 71a. The strength and value of the programs were recognized and complimented. Pet. App. 71a, 72a, 73a. The panel, however, felt compelled to disregard the merits of these programs in favor of laying down what it perceived to be the letter of the law in strict adherence to the regulations. In the view of OE and the panel, no quarter could be given to the unique circumstances of Title I participating school districts.

During the period of time that the audits covered, there was conflicting direction to both the LEAs and the SEA regarding what constituted acceptable Title I programs. Tr. 416-430, 437. Even after the HEW auditors reviewed Pennsylvania's Title I program in 1971 and presumably found substantial defects, there was no timely assistance offered. Rather than advising the SEA on the areas of noncompliance which were identified, the audi-

tors permitted the continued operation of what they considered a defective program, and the consequent accumulation of supposed misexpenditures, and did not issue their audit report until 1975. Tr. 458, J.A. 54.

Furthermore, OE program reviewers visited the Title I program in Pennsylvania each year and, although they made suggestions for improvement which were immediately implemented, never identified defects that required the imposition of the statutory penalty of withholding. Pennsylvania was permitted to continue running its Title I program for years in a manner that was later claimed by OE to be so improper that the United States should be reimbursed for the enabling grant.[13]

When informed of the basis for the audit exceptions in this case, the LEAs immediately revised their programs to eliminate any objectionable features. Tr. 456, 458. Pennsylvania and its LEAs have always sought in good faith to comply with all Title I requirements and, since correction of the offending projects in 1973, Pennsylvania has maintained full compliance with the Title I law.

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[13] This initially resulted in a huge audit exception of around $10.9 million. J.A. 59, 60. Persistent review, sought by Pennsylvania at various levels, gradually reduced this figure to the present amount claimed: $422,424.29. Pennsylvania's experience in this regard suggests that the figures claimed by the agency to be owing as a result of audit exceptions are vastly inflated. This figure represents only .1% of Pennsylvania's total grant for the years in question, contrary to the allegation in petitioner's brief at 10 and 42 that substantial misexpenditures are at issue.

SUMMARY OF ARGUMENT

The Title I statute provides for a complete and effective enforcement scheme which precludes the use of any extra-statutory penalty. The statute imposes various responsibilities for the achievement of its purpose on the parties to the grant and provides for their enforcement by granting the agency power to disapprove applications for funds and to withhold funds from noncomplying programs until they are corrected. When a statute imposes a liability and prescribes a remedy to enforce it, as the Title I statute has in this case, that remedy is exclusive.

The statutory provisions for withholding of funds, available to the administrative agency in Title I, is particularly effective in compelling compliance with the agency's requirements. The careful construction of Title I, noted in the Third Circuit's Opinion, is designed solely to achieve one end: that of educating economically disadvantaged underachievers. It is no mistake, therefore, that the enforcement mechanism built into this structure is therapeutic rather than punitive. It insures the success of the program by withholding funds until compliance is achieved instead of crippling it by requiring reimbursement of prior grants, whether by offset or other means.

Administrative agencies can act only to the extent they are given power by their authorizing statute. As creatures of statute, agencies are bound to implement the powers dictated by Congress. It is the agency's obligation to enforce a statute according to its terms. In this case, it was the agency's obligation to notify Pennsylvania of any programs that failed to comply substantially with the statute and to withhold funds only until satisfied that compliance was achieved. This remedy was not only an obligation but also a limitation to the agency. The agency has no power to substitute its own judgment for that of

Congress by using an enforcement scheme not contemplated in the statute.

Any inherent power the United States government has to collect repayments of federal funds erroneously or illegally paid is inapplicable here. The payments at issue here were supplementary to the LEAs' regular school program. None of the Title I funds for the years in question have been retained by the SEA nor has the SEA been financially enriched by its participation in Title I, unjustly or otherwise. Pennsylvania's Title I grant is not a debt subject to common law repayment powers. Any challenges to the legitimacy of Pennsylvania's Title I program must be exercised according to the statutory design.

The petitioner's brief suggests that the agency simply seeks authority to setoff amounts allegedly misspent against future grant payments. If such a right to offset exists, it cannot be perverted into a power to require state reimbursement of federal funds or to permit federal control over state expenditures in its educational programs. In this regard, the Federal Claims Collection Act cannot be cited for authority that the agency otherwise lacks. Originally enacted primarily to permit agencies to accept voluntarily tendered payments in settlement of claims, the Federal Claims Collection Act has always been directed to resolution of claims by or against individuals. The most recent amendment to this Act, authorizing agencies to collect claims by means of administrative offset, specifically excludes states from its reach.

Finally, there is no legal authority to support the retroactive operation of the repayment provisions found in the Education Amendments of 1978. If the Court applies the law in effect at the time it renders its decision, the Education Consolidation and Improvement Act of 1981 applies to what were previously Title I programs. This Act

specifically declares the repayment provisions of the 1978 Amendments inapplicable.

If any part of either the 1978 Amendments or the ECIA should be applied retroactively, it would be that aspect of the law which is curative or remedial. The beneficial provisions giving greater discretion to LEAs to conceive and implement their Title I programs in harmony with local goals and priorities could be applied retroactively. Under these standards, Pennsylvania's programs of 1970 through 1973 would be complying.

Elements of the 1978 Amendments which increase the liability of grant recipients, or change the terms on which the grant of funds were originally premised by requiring reimbursement, are not applicable retroactively. The rule is that legislation is prospective only. It is in the interest of justice that parties' legitimate expectations based on the law at the time they acted be given effect. The Third Circuit correctly found that this is particularly true with respect to grants which subject participating states to burdensome conditions. Since the only control a state can exercise is to decline to participate in the grant relationship, it is essential that the terms of its participation are clearly expressed and not subject to implication or later amendment. A state's agreement to subject itself to the express conditions in the grant is not effective consent to conditions which are later enacted or implied.

ARGUMENT

I. THE TITLE I STATUTE PROVIDES COMPLETE AND EFFECTIVE REMEDIES FOR ITS ENFORCEMENT WHICH EXCLUDE AN UNSTATED SANCTION OF REIMBURSEMENT.

A. Administrative Agencies are Limited to the Powers Expressed in the Statute.

The distinguishing attribute of an administrative agency is its total dependence on its authorizing statute. An agency is a creature of statute and, for any of its conduct, derives its power solely from the law by which authority it is acting. Its reach is always coextensive with the authority of a statute; it cannot exceed the statute's limitations. *Peters v. Hobby*, 349 U.S. 331 (1955); *Jones v. SEC*, 298 U.S. 1 (1936); *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931); *Morrill v. Jones*, 106 U.S. 466 (1882); *Sioux Valley Empire Electric Ass'n v. Butz*, 504 F.2d 168 (8th Cir. 1974); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

Congress dictates an agency's direction and declares the purpose of its existence; "the determinative question is not what the Board thinks it should do but what Congress has said it can do." *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961). Thus, an agency is required to implement a statute according to its purpose and, when it takes action, such action must be founded upon the proper basis of Congressional authority and not mere good intention, personal insight, prejudice or predilection. *Dixon v. United States*, 381 U.S. 68, 71 (1965); *Oregon & California R.R. v. United States*, 238 U.S. 393 (1915); *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974); *aff'd*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

The implication of powers not expressed in the statute is subject to an extremely heavy burden. An agency which would go outside the terms of the statute must demonstrate that such power is practically indispensable

and essential to execute the authority expressly conferred. It is not sufficient to show that the implied power is merely advantageous, convenient, or effectual in the exercise of the expressed power. 2 A. Sutherland, Statutory Construction, § 55.03 (4th ed. 1973); *see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Milwaukee v. Illinois*, 451 U.S. 304 (1981). Where Congress speaks with particularity and specificity, rather than with broad and permissive terms, its purpose to confine the boundaries of the agency's delegated authority to the terms of the Act can be assumed. *Zuber v. Allen*, 396 U.S. 168 (1969). Attempts by the agency to make its own law will be deemed a nullity. *Dixon v. United States*, 381 U.S. 68, 75 (1965); *School Board v. HEW*, 525 F.2d 908 (5th Cir. 1976).

B. The Remedy Expressed in a Grant Statute is Exclusive.

A corollary to the fundamental principle that an administrative agency is restricted to the authority conferred by statute is the principle that the expressed remedy in a statutory scheme is exclusive.

> A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone must be employed.

Pollard v. Bailey, 87 U.S. 520, 527 (1874); *accord, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974). The logical basis of this principle is that in developing the statutory scheme, Congress provided precisely the remedy it considered appropriate. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). When Congress intends to supply a particular remedy, it is well aware of how it may effectuate that intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

It is not up to either the executive or judicial branch of government to improve on Congressional action. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1908). If an enforcement mechanism provided in a statute is not everything an agency would like it to be, the recourse is to express that opinion to Congress and seek a change in the law. Nor is the fact that the agency can think of an additional remedy, not available in the statute, meaningful as an indication of some deficiency. This Court has noted "[f]rom the defects of a provision we can deduce nothing nor on account of them substitute one of greater efficacy." *Oregon & California R.R. v. United States*, 238 U.S. 393, 420 (1915).

Where Congress has acted to provide a remedy, the agency has express authority to that extent and there is no need to imply authority to use any other remedy. An agency is not at liberty to declare that a hiatus exists in the law simply because it does not find there the penalty it wishes to impose, and then assume for itself some implicit authority found lurking in the gap. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Touche Ross Co. v. Redington*, 442 U.S. 560, 578 (1979). Congressional silence is strong evidence that it did not intend to grant a particular power, especially when express authority has consistently been granted in other contexts. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973).

C. It is Inconsistent with the Title I Statute to Require Reimbursement of Expended Grant Funds.

1. *The statutory withholding remedy effectuates the purpose of the grant.*

In Title I, Congress nicely balanced the respective obligations of the federal agency and the state to provide money to LEAs for the education of the disadvantaged. To enforce the obligations of the grant, Congress author-

ized the agency to employ two remedies. One, application disapproval, is to be utilized when a state's application fails to conform to the requirements of the statute. 20 U.S.C.A. § 241f(b), Pa. App. 1a. The other, withholding of funds, requires the Commissioner to suspend payments to a state which is substantially out of compliance with the requirements of the statute until he is satisfied there is no longer a failure to comply. 20 U.S.C.A. § 241j (1974), Pa. App. 2a. Neither of these two remedies has ever been enforced against Pennsylvania.[14]

Should it ever be used, withholding of funds could be an extremely effective remedy. Notification that Title I funds would not be available until the Commissioner is satisfied with the program would make an LEA eager to comply with the agency's directions whether it agreed with them or not. Both the SEA and the LEAs in Pennsylvania have always been willing to adopt the recommendations made by agency personnel in order to keep the Title I program intact. If an LEA's receipt of Title I funds were contingent on its conformity to the agency's recommendations for future programs, the SEA and the school district would be under a great deal of public pressure [15] to comply promptly and to ask questions later. This enforcement method would tend to put petty disputes in perspective and eliminate much of the wasteful and protracted litigation with which Title I has been encumbered.[16]

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[14] Regulations were issued on September 15, 1965, implementing these remedies contemporaneously with the statute. *See* 45 C.F.R. § 116.51 (1972), and § 116.52, *as amended* § 116.52(b) (1972).

[15] *See* 20 U.S.C.A. § 241(*l*), establishing National Advisory Council on the Education of Disadvantaged Children; 45 C.F.R. § 116.17(o)(1) (1972), establishing Parent Advisory Councils at the local level.

[16] As of 1980, at least 26 states had pre-1978 audit cases still pending. The average audit case at that time had been pending for 8 years. *To Dismiss Certain Cases Pending Before the Educa-*

The enforcement methods expressed in the statute are consistent with the goal of correcting the program and advancing the purpose of the grant. S. Rep. No. 91-634, 91st Cong., 2d Sess. 10 (1970). The purpose of Title I is not only to provide a heretofore unavailable educational opportunity to disadvantaged youngsters, but also to build on gains achieved as the child advances through the program. The inspiration to provide such a program comes in the form of an annual grant passed through the SEA to the individual LEA recipients which are responsible for the program. Since the value of this type of program is in its continuity, Congress expected to see it continue year after year. Enforcement methods which cause disruption or forfeiture of the grant are therefore not desirable. *Cort v. Ash*, 422 U.S. 66, 84 (1975).

The enforcement powers expressed in the statute are consistent with Congress's expectation. By its terms, the withholding remedy is focused on the correction of any substantial noncompliance by an LEA.

> Whenever the Commissioner . . . finds that there has been a failure to comply substantially with any assurance set forth in the application approved . . . , the Commissioner shall notify the agency that further payments will not be made to the State . . . until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State . . . .

20 U.S.C.A. § 241j.

This language is mandatory: it requires the Commissioner to act in a case of substantial noncompliance by withholding funds. But it also compels correction of the program: payments will be withheld until there is no longer any such failure to comply. Clearly this language

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tion Appeal Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor, 96 Cong., 2d Sess. 32 (1980).

provides a therapeutic, as opposed to a punitive, measure of enforcement.[17] The point is not to acquire money from the states but to provide education to the disadvantaged.[18]

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[17] *See* Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

[18] The petitioner's brief raises the fear that the remedies available in the statute are not sufficiently severe to discourage or compensate for egregious violations of the statute. The Brief of Amicus Curiae in Support of Petitioner makes references to theft of funds and wrongful conversion while the petitioner's brief considers the funds squandered and wrongfully retained. It is apparent from the facts in the present case that these terms do not describe the audit exceptions brought against Pennsylvania. The discussion in this brief at 8-11 makes clear that the audit exceptions resulted from differences between the LEAs responsible for program implementation and the visiting auditors in interpreting ambiguous regulations.

Nevertheless, in a Title I program implemented in 505 LEAs in Pennsylvania, by thousands of employees, substantial error, or even dishonesty, is possible. In those cases, the United States is not without remedy. Fraud, theft, or other conduct rising to criminal dimensions is punishable through the criminal law. *See* United States v. Farrell, 418 F. Supp. 308 (M.D. Pa. 1976). Civil fraud actions would permit recovery in such cases. United States v. Borin, 209 F.2d 145 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954). In circumstances where the ultimate beneficiaries of the program perceive harm, third party actions can be instituted. *See* Wheeler v. Barrera, 417 U.S. 402 (1974). Also, the Civil Rights Act of 1964 would provide a remedy if program error resulted in discrimination. 42 U.S.C.A. § 2000d. Lau v. Nichols, 414 U.S. 563 (1974).

The most effective enforcement method could be the provisions for policing the grant which are structured into the statute. Public attention to the expenditures under the grant is assured by the provision for public complaints, 45 C.F.R. § 116.31(g) (1972), as well as the National Advisory Council and Parents Advisory Councils.

The agency also has substantial responsibility for guiding Title I administrators to a correct application of the law. Such prospective grant enforcement is both effective and common. *See, e.g.*, Lopez v. Luginbill, 483 F.2d 486 (10th Cir. 1973), *cert. denied*, 415 U.S. 927 (1974); Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

In contradistinction to this carefully designed and beneficent remedy, the unexpressed and unrestrained penalty of reimbursement is not effective in achieving a proper education program. It encourages disputes, not correction, because it focuses on past efforts and not on the future. The SEA and LEAs are not encouraged to correct their program in the future but instead to defend their past practices in order to save their grant. Such large sums are involved that program administrators have no choice but to litigate, thus magnifying petty errors and disagreements in an effort to justify their decisions.

An adverse decision requiring reimbursement of past grants does nothing to help, and much to hurt, the current program. If the money is recovered by means of setoff against the current grant, there quite simply will be less money available to fulfill the purpose of the grant. If the money comes out of scarce state and local resources, the same result obtains. If reimbursing past grants becomes too expensive, the least affluent LEAs, and perhaps even the SEA, may no longer be able to afford to participate in Title I. This, of course, would complete the total destruction of Congress's purpose.

2. *Reimbursement of grant funds is inconsistent with the withholding remedy.*

The remedy provided by the statute in cases of substantial noncompliance is comprehensive and therefore precludes the intrusions of additional, unexpressed remedies. In enacting Title I, Congress considered the problem of noncompliance and prescribed withholding of funds as a remedy. The requirement of program compliance coupled with the remedy of withholding occupies the field [19] and leaves no room for implication or common law. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 n.30 (1981); *Transamerica Mort-*

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[19] Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pollard v. Bailey, 87 U.S. 520 (1874).

gage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

The fact that Congress chose to apply the remedy only to instances of substantial noncompliance, and designed the enforcement tool to affect future payments only, does not prove a gap in the enforcement scheme. "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981). The agency's demand for reimbursement in cases of insubstantial violations and in cases where the grant funds have been expended is not filling a hiatus in the statutory scheme; it is simply creating a different scheme outside of the statute.

The penalty of reimbursement is actually in conflict with the terms of the statutory provision for withholding. When substantial noncompliance is found, the Commissioner is required by the terms of the withholding provision to make no further payments until he is satisfied that there is no longer such failure to comply. The language is mandatory. It requires the agency to act by withholding funds when substantial noncompliance is found. Failing to withhold funds in such circumstances is not a prerogative of the Commissioner.

Similarly, the statute requires that the withheld funds be released when the LEA can satisfy the Commissioner that the program is again complying. Again, this is not a matter left to the agency's discretion: OE cannot continue to withhold funds against a complying program on the theory that it is entitled to reimbursement. It is inconsistent to assume that the agency has power to require reimbursement of Title I funds, or offset against such funds, when the statute itself so clearly requires the Commissioner to fund complying programs. *Oregon & California R.R. v. United States*, 238 U.S. 393, 417, 435-36 (1915); *School Board v. HEW*, 525 F.2d 908 (5th Cir. 1976).

The remedy of withholding envisions a suspension of funds to encourage the LEA to bring its program back into compliance. Enforcement is thus perfected: compliance is achieved without harm to the program. A demand for reimbursement flies directly in the face of this structure. The agency assumes the power either to seize program funds or to demand a direct payment from the state treasury, whether the program has been corrected or not. There is no longer any purpose in withholding funds until the Commissioner is satisfied with the program if those very funds are subject to reimbursement. There is no pressure on the LEA to bring its program into compliance. The withholding remedy provided by statute is completely undermined and negatived by OE's preference for reimbursement, a penalty not even considered in the law.[20]

3. *An undefined reimbursement penalty is contrary to Title I's careful structure.*

The enforcement mechanisms were built into the Title I statute in such a way that the recipient was protected from arbitrary agency action. The statutory remedies are hedged with a procedure requiring reasonable notice and opportunity for a hearing as well as judicial review. 20 U.S.C.A. §§ 241f, 241j, 241k, Pa. App. 1a, 2a. Additionally, the agency was limited in its use of the withholding remedy to circumstances where it could prove substantial noncompliance.

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[20] If Congress wanted to penalize the SEA for past noncompliance, and not simply achieve effective program operation by insuring program compliance, it could have coupled the withholding remedy with a repayment provision to be used in appropriate circumstances. This was done in the School Construction in Areas Affected By Federal Activities Act. Withholding was permitted, but was not mandatory, where substantial noncompliance was found until correction was achieved. If correction was impossible, withholding of funds continued until repayment of improper expenditures had taken place. 20 U.S.C.A. § 641.

The absence of a corollary restriction generally utilized in connection with a power indicates the absence of that power. *Middlesex Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981); *Alcoa S.S. Co. v. Federal Maritime Comm'n*, 348 F.2d 756 (D.C. Cir. 1965); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). It is not logical to assume that Congress intended to empower OE to require reimbursement of grants, a penalty more severe than any provided in the Act,[21] and not only failed to provide procedural protections in connection with its implementation but also failed to mention it entirely. *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 19-21 (1979). Congress's interest in protecting the program, the grantees, and the beneficiaries from an overreaching agency is apparent from the built-in protections which accompany the enforcement provisions. These protections become meaningless if the most severe penalty of all can be wielded by the agency without restriction. It is senseless to assume that the agency can avoid a process designed to protect the grantee by the simple expedient of utilizing a more severe penalty than that expressed in the statute. *Oregon & California R.R. v. United States*, 238 U.S. 393, 419-22 (1915).

Because sovereign states are grantees under Title I, particular care must be taken to see that protections are written into the statute. The petitioner argues in his brief at 27 that states have no constitutional right to due process. This perceived freedom from any obligation to provide due process to states is seized upon by the agency as a basis for imposing penalties with impunity once it is permitted to go beyond the statute to find its power. For example, although the petitioner now argues to this Court that grantees aggrieved by final agency action may ap-

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[21] Reimbursement of grant funds already spent has been recognized as the most severe penalty, surpassing even the denial of further funding. Davis v. HUD, 627 F.2d 942 (9th Cir. 1980).

peal to federal courts,[22] it has argued the contrary position before the circuit courts and the Title I Audit Hearing Board. Its position in these lower tribunals was logical: because the penalty it was invoking was beyond the statute, no statutory protections applied.[23] Here we find a demonstration that the agency's willingness to appear reasonable, even generous, in theory can turn to punitive rigidity in practice if not controlled by statutory restraints.

The later amendment of Title I to include a reimbursement penalty is further evidence that the early Title I statute should be given a different construction. *United States v. McClure*, 305 U.S. 472 (1939); *United States v. Bashaw*, 152 U.S. 436 (1894). Furthermore, when OE was finally given power to employ the penalty in 1978, its power was restricted by detailed procedural safeguards which included an opportunity to appeal adverse agency rulings as well as the requirement that the agency implement hearing procedures through regulation. 20 U.S.C.A. § 2835 (Supp. 1982). The force of the penalty was further softened by a provision that up to 75% of the amount found reimbursable could be returned if an LEA corrected its program. 20 U.S.C.A. § 1234e (Supp. 1982). These limitations demonstrate Congress's ever present overriding concern for the welfare of the grantees and beneficiaries of the program. Although ready to try stricter enforcement methods, Congress's major focus was still on correction and the continuation of a strong program, and not on an alternate source of revenue for the federal treasury.

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[22] Brief for Petitioner at 19, 23.

[23] Transcript of prehearing argument before the Title I Audit Hearing Board, Pa. App. 10a, and from Memorandum in Support of Appellee's Motion to Dismiss, California State Board of Education v. Boyer, No. 78-3385 (9th Cir. Nov. 1, 1979), Pa. App. 13a. The Ninth Circuit dismissed the case pursuant to the agency's motion.

It is apparent in the statutory scheme of Title I that there is neither a basis in the structure upon which an implied penalty can be built nor any interstice in the fabric through which a common law penalty can arise. Congress well knew how to provide such a penalty if it wished. *United States v. Union Pacific R.R. Co.*, 98 U.S. 569, 616 (1878). It had, after all, provided such remedies before Title I was originally enacted,[24] in the same Elementary and Secondary Education Act of 1965 of which Title I was a part,[25] and in the 1978 Amendments to Title I itself. 20 U.S.C.A. § 2835 (Supp. 1982). It is quite clear that for such a severe penalty Congress would not and did not rely on the assumption that the agency possessed such a power through some other source. *Milwaukee v. Illinois*, 451 U.S. 304 (1981). In demanding reimbursement of grant funds, the agency has departed from its statutory mandate and exceeded its authority. *California v. Block*, 663 F.2d 855 (9th Cir. 1981). Its actions are therefore without force and cannot be given effect.

II. THERE IS NO INHERENT OR IMPLIED RIGHT TO REIMBURSEMENT OF EXPENDED GRANT FUNDS.

A. The Inherent Right to Repayment is Limited to Cases of Erroneous Payments.

The inherent authority of the federal government to collect erroneously or illegally paid funds is inapplicable to the present case. The rule of inherent authority exists independently of, and consistently with, the requirement that agencies derive their power from authorizing statutes. The error in the agency's thinking in confusing

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[24] *See, e.g.*, the Second Morrill Act of 1890, 7 U.S.C.A. § 325; School Construction in Areas Affected by Federal Activities Act, 20 U.S.C.A. §§ 637(b), 641.

[25] 20 U.S.C.A. § 847 (1974).

these two principles lies in its misconception of what constitutes an erroneous payment.[26]

In each of the cases cited by the petitioner, an agency exercised inherent power, as opposed to statutory power, for the collection of money only in cases where a clear error was made in connection with the payment. Erroneous payments in these cases were always made by the federal government itself, through its officials, by virtue of mistakes such as miscalculation, accidental overpayments, or payments based on fraudulent information or willfully withheld information.

In the present case, the grants sought to be recovered were not paid on the basis of a miscalculation or a fradulent representation or as a result of any illegality or mistake. The Title I grants to Pennsylvania during the years in question were calculated correctly on the basis of proper applications by LEAs for legitimate Title I programs. Even if it happened that later on auditors disputed the broad focus of an LEA's Title I program, or criticized the source of data for some schools designated as eligible by the LEA, expenditures of grant funds by a beneficiary LEA on its Title I program cannot be said to render the original grant of funds an erroneous payment. *See Butte, Anaconda & Pacific Ry. v. United States*, 290 U.S. 127 (1933); *United States v. Bank of Metropolis*, 40 U.S. 377, 401 (1841); *United States v. Russell Mfg. Co.*, 349 F.2d 13, 16-18 (2d Cir. 1965).

Whereas an adminisrative agency has the power to collect overpayments on miscalculated tax refunds without benefit of statutory authority, it must still look to its authorizing statute for the power to enforce grant conditions. Under no authority does an instance of noncompliance in the Title I program immediately turn the grant to a debt collectible by any means known to common law.

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[26] Brief for Petitioner at 15.

The status of properly paid grant funds and the rights and obligations of the parties to a grant are at all times determined by the statute.

The logical basis for any assertion of inherent authority to collect erroneous payments is to prevent unjust enrichment of the recipient with funds he has no right to retain. Where there is no enrichment to the recipient of the payment, the reason for the rule fails. *United States v. Hadden*, 192 F.2d 327 (6th Cir. 1951); *United States v. Systron-Donner Corp.*, 486 F.2d 249 (9th Cir. 1973). In the present case, the SEA and the LEAs were endeavoring to implement effective Title I programs. They neither retained grant money nor used the funds to further their own purposes. Funds were passed from the SEA to the LEAs according to law and used to conduct programs for the education of the disadvantaged which would not otherwise have been offered. The Title I program offered in Pennsylvania was supplementary to the regular program of instruction provided through expenditure of state and local funds.[27]

Far from bringing financial enrichment to the state or LEAs, Title I is and was an expensive program for the state grantee and the LEA beneficiaries. The requirement that LEAs maintain the same fiscal effort expended on their regular program of instruction during the two years preceding each year that Title I is offered, freezes education expenditures at the highest level reached over those years. 20 U.S.C.A. § 241g(c)(2).

Furthermore, contrary to repeated assertions throughout petitioner's brief, neither the state nor the LEAs retained Title I funds. Rather, the grant was completely

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[27] The grant funds at issue were not used to supplant local funds and thus reduce the tax burden of the school district, as alleged in petitioner's brief at 18. Supplanting is a separate violation, 45 C.F.R. § 116.17(h) (1972), which was not alleged in the present case.

expended on programs designed to educate the disadvantaged. Therefore, no hoard of wrongfully retained money exists against which to assert the assumed offset power. Any setoff of funds will have to be against future program money. As was foreseen by the Third Circuit, such a remedy causes grave injury to Congressional objectives. Pet. App. 22a. Hypothetically, the program would then suffer twice: once, possibly, when the disputed expenditures were made and again, definitely, when the penalty reduces the program.

Alternatives suggested in petitioner's brief at 20 and 21 impose a double penalty on states by coupling loss of federal funds with required additional expenditures of state and local funds to meet the shortfall. 2 R. Cappalli, Federal Grants and Cooperative Agreements, § 8:20 (1982). If the state or LEA is required to repay money from some source other than the Title I program, or meet program goals by increasing its fiscal effort, which amounts to the same thing, the double penalty is assessed. Such financial injury might cause ultimate loss of the program when the already impoverished LEA finds Title I too expensive to maintain. In any event, such control over state appropriations for education by a federal agency constitutes unacceptable interference in the government of a sovereign state without statutory authorization by Congress. *See* Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 Am. U. L. Rev. 279 (1979); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 Yale L.J. 1694 (1981).

Although Pennsylvania has not been unjustly enriched by its Title I program, the federal treasury would receive an unjustified windfall if reimbursement were permitted. A supplementary education program would have been provided pursuant to Congress's wishes and the grant funds which were appropriated to support it would

be returned to the treasury. No justification for such a result has been demonstrated.[28]

Disputes regarding the expenditure of grant funds are therefore inappropriate for the exercise of any inherent authority an agency possesses to collect debts without resort to statute or litigation.[29] The corollary rule that Congress must explicitly enact a barrier to prevent an administrative agency from acting on its own to collect money by any means whatever[30] is also inapplicable. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). On the contrary, explicit statutory prohibitions are not required to restrain agency actions to the boundaries of the law. When Congress has addressed a question, the need to resort to secondary sources of authority, such as implication or common law, vanishes.

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[28] Although Pennsylvania's Title 1 programs did not enrich it financially, the programs did provide enrichment to the education of the disadvantaged. This type of enrichment cannot be referred to as unjust, however, nor should it be subject to a financial penalty. It was, after all, the purpose of the grant to provide just such programs. The panel of the Title I Audit Hearing Board which heard Pennsylvania's case was constrained by no standard of substantiality which may have avoided a finding that the Title I programs were in violation of the regulations, but it did recognize the value of the program. "The testimony of the McKeesport pesronnel displayed sufficient sensitivity to the needs of those students identified as slow learners to make it difficult to characterize the entire program as one which was designed 'merely' to serve the entire schools . . . [The parties failed to agree on a settlement] to reduce the financial penalty assessed many years after the fact against the school district that, in admittedly difficult circumstances, failed to follow the letter of the law." Pet. App. at 73a.

[29] In its opinion below, the Third Circuit noted how the agency's chosen method of enforcement defeated Congressional objectives with the double penalty as well as how the cases relied upon failed to support the inherent power claimed by the agency. Pet. App. 22a-23a.

[30] Brief of Petitioner at 23.

> Thus, the question was whether the legislative scheme "spoke directly to a question" . . . not whether Congress had affirmatively proscribed the use of federal common law. Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal' " when Congress has addressed the problem.

Milwaukee v. Illinois, 451 U.S. 304, 315 (1981), *quoting TVA v. Hill*, 437 U.S. 153, 195 (1978). The statutes raised by the petitioner therefore are not to be searched to find whether they raise barriers to some unrestricted authority of the agency, but should be read to determine whether in addressing the issue of enforcement Congress expressly provided for reimbursement of expended funds.

B. The Title I Law Does Not Support a Right to Repayment.

The Title I statute in effect at the time the programs were conducted contained neither the expression nor the implication of reimbursement authority. The General Education Provisions Act (GEPA) contains a general requirement that grant recipients keep records for audit by the federal government. 20 U.S.C.A. § 1232c. GEPA also contains authority to adjust grant payments on account of overpayments or underpayments.[31] 20 U.S.C.A. § 1232d. Clearly, neither of these sections contemplates reimbursement.

Section 1232d, titled "Payments," concerns the manner in which the grant funds are to be paid to the recipient from the federal agency. The adjustments to be made on account of overpayments refers to unexpended and excess funds held by the recipient from prior grants. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965]

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[31] Petitioner argues that these sections support his claim for reimbursement. Brief of Petitioner at 31-34.

U.S. Code Cong. & Ad. News 1459-1460.[32] Similarly, there is no suggestion in § 1232c that the audits referred to would result in reimbursement. In light of the Third Circuit's discussion in its Opinion, Pet. App. 17a, it is unnecessary to enumerate all the purposes besides reimbursement for which audits would be necessary or useful.

The statute of limitations passed in 1974 also fails as authority for the reimbursement of Title I grant funds. Statutes of limitations are not grants of new rights or powers but are limitations on existing rights or powers. The intent of this statute was to limit any powers the agency had to affect the grants under its control and it was designed for the benefit of the grant recipients. *United States v. Wurts*, 303 U.S. 414 (1938). Such a section cannot be used to extend authority beyond what is provided in proper authorizing sections.

It must be remembered that the statute of limitations is part of GEPA and is generally applicable to all education grant programs, some of which have repayment sanctions.[33] Its limitation is therefore expressed in generally inclusive terms. As it relates to Title I, its effect is to restrict the agency's power to adjust payments under the grant pursuant to 20 U.S.C.A. § 1232d, concerning overpayments, to the period specified. Furthermore, this section was passed in 1974, subsequent to the operation of the programs in question, and therefore, even if it did constitute authority for reimbursement, could not be applied retroactively to affect programs previously concluded.[34]

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[32] As the Third Circuit noted in its Opinion, Pet. App. 17a, 18a, this reading of the law is supported by the 1978 Amendments which contain both the payment provision and the reimbursement remedy. 20 U.S.C.A. §§ 2841, 2835 (Supp. 1982). To avoid reading redundancies into the Act, the payment provision must be given a different construction than that advanced by the agency.

[33] *See* this Brief at nn.20, 25, *supra*.

[34] *See* Section III of this Brief at 41, *infra*.

The agency's belief that it was entitled to reimbursement of expended grant funds was never reduced to regulation. Despite Congress's concern for specificity, authority, and uniformity in its conduct and pronouncements, OE never published in the *Federal Register* the enforcement procedure for which it argues in this case. The GEPA statute in effect at the time the disputed programs were in operation required OE to publish any "rule, regulation, or requirement of general applicability prescribed for administration of any applicable program" thirty days before it was to take effect. Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970), § 421(b), Pa. App. 7a. To ensure that such rules were authorized, OE was required to cite to the exact statute or authority upon which it relied for its power. *Id.* § 421(a). Congress recognized the need for published rules as a means for insuring fairness and consistency in the administration of such a broad program as Title I. *Id.* § 421(c).[35] In the absence of statutory authority, or even regulations purporting to establish an allegedly implied power, the agency has no basis on which to exercise its demand for repayment.

C. The Federal Claims Collection Act Does Not Support a Right to Repayment or Offset.

Similarly, the Federal Claims Collection Act of 1966 cannot substitute for the essential power that the agency lacks.[36] 31 U.S.C.A. §§ 951-953. The Act is not authority for rights or obligations which do not otherwise exist. It was enacted to correct a specific problem: law existing

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[35] The Administrative Procedures Act provides further authority for the requirement that agency action of such import as the imposition of sanctions requires not only formal rulemaking processes but clear legal authorization. 5 U.S.C.A. §§ 551, 553, 558. The rulemaking exception relating to grants, 5 U.S.C.A. § 553(a)(2), was voluntarily waived by HEW in recognition of the importance of public participation in rulemaking. 36 Fed. Reg. 2532 (1971).

[36] Brief for Petitioner at 24-28.

at the time of its enactment prevented or severely limited agencies from handling their own collection cases. Its stated purpose was to authorize agencies to compromise certain claims. S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2532, 2536. Its intent was to provide "for a more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." *Id.* at 2533. The Act overcame the cumbersome, time-consuming, and expensive requirement pervasive in the law that agencies refer their collection cases to the General Accounting Office by permitting, in § 3(a),[37] collection by agencies themselves and by permitting, in § 3(b),[38] the compromise of claims.

The Act unequivocally requires that authority to assert the claim in question be granted through some other statute. Section 4 of the Act[39] provides that "nothing in this chapter shall increase . . . the existing authority of the head of an agency to litigate claims . . . ." The legislative history pertaining to § 4 goes on to note that the new authority to compromise claims does not "change the statutory basis of such existing authority." S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2534. Statutory authority for the claim is therefore separately required before the Federal Claims Collection Act can be used by the agency to attempt collection or compromise of the matter. *Cf. Colorado v. VA*, 602 F.2d 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980).

The Federal Claims Collection Act was recently amended by the Debt Collection Act of 1982. Pub. L. No. 97-365, 96 Stat. 1749 (1982). This amendment removes

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[37] 31 U.S.C.A. § 952(a).

[38] 31 U.S.C.A. § 952(b).

[39] 31 U.S.C.A. § 953.

all possible doubt that § 3(a) (31 U.S.C.A. § 952(a)) does not authorize the agency to recoup or offset its claims against a state's grant funds. The power to collect claims under § 3(a) by means of administrative offset is explicitly provided in a new section of the Federal Claims Collection Act[40] which simultaneously explicitly excludes states from its reach. Pub. L. No. 97-365, § 10, 96 Stat. 1749.[41]

The new amendments to the Federal Claims Collection Act are designed to provide agencies with specific tools to cope with the increasing backlog of delinquent debts owed to the United States.[42] The explicit focus on private and individual debtors is consistent with the intent expressed in the legislative history to the Federal Claims Collection Act of 1966 that the collection and compromise authority therein provided be for the purpose of resolving claims relating to individuals. S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2533.

The agency's misplaced reliance on the Federal Claims Collection Act and the Debt Collection Act demonstrates

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[40] Section 10 of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 10, 96 Stat. 1754, amends the Federal Claims Collection Act of 1966, 31 U.S.C.A. §§ 951-953, by adding a new section 5.

[41] Section 5(e)(2) of the Federal Claims Collection Act, added by the Debt Collection Act of 1982. Interestingly, states are also excluded from the new provision for interest and penalty on indebtedness to the United States added to § 3 of the Federal Claims Collection Act, 31 U.S.C.A. § 952 (1976), in the new sub-section (e)(8) added by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1756.

[42] The claims with which Congress is concerned are discussed in the legislative history to the Debt Collection Act. By far the largest portion of the debt which is the subject of the collection powers expressed in this Act is in the form of loan receivables. S. Rep. No. 97-378, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. Code Cong. & Ad. News 3378. Other debts mentioned were interest and unpaid taxes. The only reference to program beneficiaries was in connection with an insignificant portion of delinquent debts and referred to over-payments. *Id.* at 3379.

its persistent effort to treat state grantees as if they were individuals, but without the legal protections obtaining to individuals, and to treat grants as if they were merely contracts for services. Although grants have attributes of contracts and it is sometimes useful to view them in that light,[43] public grants are not in every respect coincident with contracts for goods or services.

Generally, a relationship between the federal government and the state government is contractual when the principal purpose is the acquisition of property or services for the direct benefit of the federal government. A grant, on the other hand, has as its principal purpose the transfer of money to the state to accomplish a public purpose beneficial to some third interest. In a grant, no substantial involvement of the federal government is expected. *Compare* Federal Grants and Cooperative Agreements Act of 1977, 41 U.S.C.A. § 503 (Supp. 1982) *with* 41 U.S.C.A. § 504 (Supp. 1982). Grant funds pursuant to the purpose of a grant statute, even if they are spent in error, cannot automatically be considered debts to the federal treasury. Grants do not create a financial interest in the federal agency but look to a broader purpose and another beneficiary. *Oregon & California R.R. v. United States*, 238 U.S. 393, 410 (1915); *United States v. Union Pacific R.R.*, 98 U.S. 569 (1878). The analogy between grants and contracts, while useful, is not perfect, and to assign noncompliance in grant programs the status of debts to the grantor agency requires statutory authority.

D. Clear Expression of Grant Conditions is Required.

The unexpressed intent of Congress provides no basis for conditioning the grant of federal funds to states. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), this Court insisted that Congress speak

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[43] Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981).

with a clear voice in fixing the terms on which it disbursed federal money to the states pursuant to grants. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 17.

In reaching this result, the Court considered the effect that the imposition of Congressional policy has on areas of traditional state sovereignty.[44] As a result, it expressed a reluctance quickly to attribute to Congress an unstated intent to impose affirmative obligations on the states.[45] "The case for inferring intent is at its weakest where, as here, the rights asserted impose affirmative obligations on States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17.

Congress's power to impose conditions on states through the medium of federal grants is based on the states' voluntary participation in the grant program.[46] Acceptance

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[44] As noted by the Third Circuit, Pet. App. 5a-7a, 17a, education is an area which has historically been entrusted to local control. Board of Education v. Rowley, No. 80-1002 (U.S. June 28, 1982). Grant programs involving sovereign states must operate within the tripartite system of government. Pet. App. 12a, 13a, 24a.

[45] The petitioner's intention to impose affirmative obligations through the requirement of reimbursement of grant funds is revealed in his brief at 20, 21, in his suggestion that the state be required to make direct payment to the federal government from its treasury in the amount of past grants or that the state be required to maintain a Title I program pursuant to agency direction at its own expense.

[46] Voluntary participation in grant funding schemes is a concept developed years ago in connection with early grants. Quern v. Mandley, 436 U.S. 725, 734 (1978); James v. Valtierra, 402 U.S. 137, 140 (1971); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923). The concept of voluntariness is becoming a fiction as states become more dependent on the huge sums offered under federal grant programs to provide necessary services. The financial realities dictated by the interaction of the taxation and funding practices of the

cannot be voluntary if the conditions of a grant are secret or if a state is unable to ascertain the consequences of its participation. *Id.* at 17. For a state to make the informed choice that is required, Congress's intent to impose conditions must be expressed and expressed clearly. "The crucial inquiry . . . is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25. Knowing acceptance in the present case requires not only express provision of the program requirements but also express notice of the consequences when errors in program implementation occur. When a program the size of Title I is designed to be conducted by thousands of people at hundreds of diverse localities, errors can be expected.

Considering the Title I statute in light of the principles expressed in *Pennhurst*, there is no suggestion, express or otherwise, that the states would be liable to reimburse the federal government for prior grants if errors in their administration were discovered. Regardless of the plain language of the statute, however, the petitioner cites isolated provisions of legislative history and the agency's own opinion that reimbursement of prior grants would be a good way to resolve some of the financial concerns of Congress. Brief for Petitioner at 33, 35.

In light of the finely tuned mechanism structured in the Title I statute, it is unlikely that Congress would rely on unexpressed intent to impose a penalty so severe that it overwhelms and precludes use of remedies expressly provided in the statute. In *Pennhurst*, this Court looked to the purpose of the grant and its structure as a whole to construe its meaning. In so doing, it found that

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federal government might make rejection of "voluntary" grant programs a practical impossibility on the part of the states. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979).

the express prevailed over the implicit and the whole over its parts.

> Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States.
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> . . . "In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Id. at 18, *quoting Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Similarly, in the present case, isolated segments of legislative history present too thin a reed to support imposition of the severe sanctions the agency would read into the margins of the law.

Petitioner's reliance on legislative history [47] is also misplaced under standard principles of statutory construction. Legislative history is not law and cannot substitute therefor when the sought-after provisions are absent from the statute. When a statute is plain and unambiguous, courts do not look to legislative history as a guide to its meaning. *TVA v. Hill*, 437 U.S. 153 (1978); *Ex parte Collett*, 337 U.S. 55, 61 (1949). When legislative history is considered, it is read to clarify existing provisions of the law, not to obfuscate an explicit statutory scheme with unexpressed innuendos.

In the present case, the agency has cited history which suggests that the Senate Committee on Labor and Public Welfare was aware of OE's practice of attempting to recover grant funds. Whatever this knowledge meant to the Committee, authorization for that practice never made it into the law. Administrative errors are not self-validating, and the agency's practices remain unauthorized. *SEC v. Sloan*, 436 U.S. 103 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978);

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[47] Brief for Petitioner at 28-31, 33.

Dixon v. United States, 381 U.S. 68, 78 (1965); *United States v. San Francisco*, 310 U.S. 16, 31-32 (1940).

Other legislative history accompanying later acts of Congress is read by the petitioner as a subtle effort to clarify retroactively OE's authority over previously concluded grant programs. Subsequent legislative action cannot change the intent of previously enacted statutes, and the views of one Congress form a hazardous basis for interpreting prior laws of another Congress. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Waterman S.S. Corp. v. United States*, 381 U.S. 252 (1965); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. Price*, 361 U.S. 304 (1960).

Furthermore, other reports of Congress suggest a contrary conclusion. Congress has repeatedly, and with progressively more force, commented on the need to place controls on the Office of Education and confine its activities to the explicit terms of the statute. H. Rep. No. 93-805, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4154-55. Regulations of this agency have been statutorily subjected to Congressional review and have been vetoed on at least two occasions recently for noncompliance with the statute. Congress's continuing struggle to restrain the agency to the boundaries of the law has most recently taken the form of a statutory provision severely curtailing the Secretary's authority to regulate and depriving regulations issued of legal significance.[48]

Congressional concern for the education of the disadvantaged and its direction that federal, state, and local governments work together to accomplish the purpose of Title I is certainly a more pervasive theme in the rele-

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[48] 20 U.S.C.A. § 3871(c) (Supp. 1982). This section provides that "[r]egulations issued pursuant to this sub-title shall not have the standing of a federal statute for the purposes of judicial review."

vant Congressional reports than are any suggestions that a reimbursement penalty was intended. On the contrary, Congress's intent was strongly expressed that the agency abide by the terms of the statute as it was written. *See United States v. San Francisco*, 310 U.S. 16 (1940).

III. THE EDUCATION AMENDMENTS OF 1978 DO NOT AUTHORIZE IMPOSITION OF A REIMBURSEMENT PENALTY IN THE PRESENT CASE.

A. The 1978 Amendments are Not Applicable to the Present Case.

There is no legal authority for the proposition that penalties enacted in the Education Amendments of 1978 apply to Title I programs concluded in 1973. Secretary Bell cites *Bradley v. School Board*, 416 U.S. 696 (1974), and cases with similar holdings, for the principle that an appellate court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice. The appellate court, in applying this principle, does not consider whether the lower tribunal correctly decided the matter based on the prior law, but instead considers the matter anew in light of the intervening law. *Cort v. Ash*, 422 U.S. 66 (1975); *United States v. Schooner Peggy*, 5 U.S. 102 (1801). If this Court were to apply the principle urged by Secretary Bell, it would have to look to the law in effect on the day it renders its decision and, whatever the law might be at that time, it most certainly will not be the Education Amendments of 1978.

In the everchanging picture of Title I, now Chapter 1, the Education Amendments of 1978 were superseded by the Education Consolidation and Improvement Act. Chapter 1 of the ECIA contains no express repayment penalty; its enforcement provisions are limited to a section providing for withholding of funds on much the same terms as the early Title I statute. 20 U.S.C.A. § 3872 (Supp. 1982). Because all provisions of Title I not specifically made applicable by Chapter 1 are now inap-

plicable, the repayment provisions of the 1978 Amendments have been superseded and cannot be applied. 20 U.S.C.A. § 3803(c) (Supp. 1982).

As has been noted above, details of the Title I program have historically been amended with frequency and regularity. Amendments to the new ECIA have already passed both houses of Congress, but were vetoed by the President.[49] It is only a matter of time until new amendments render obsolete the current provisions of Chapter 1. Therefore, this brief cannot discuss with any assurance the law that will be in effect at the time this Court renders its decision.

Since the present law is so uncertain, the better rule in this case is to apply the law in effect at the time Pennsylvania accepted the grant funds and operated the programs in question. This rule is supported by the strong presumption that statutes are not meant to act retrospectively, *United States v. Security Industrial Bank*, No. 81-184 (U.S. Nov. 30, 1982); *U.S. Fidelity Co. v. Struthers Wells Co.*, 209 U.S. 306 (1908), and equally by the principle expressed in *Pennhurst* that, in order for a state to give effective consent to grant conditions, there must be a clear expression by Congress of the terms to which a state will be held. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

In the interests of justice, legislation has always been considered to be addressed to the future, not to the past, absent unequivocal expression to the contrary in the terms of the statute. *Greene v. United States*, 376 U.S. 149 (1964); *Brewster v. Gage*, 280 U.S. 327 (1930); *Union Pacific R.R. v. Laramie Stockyards Co.*, 231 U.S. 190 (1913). The rule protects the rights and legitimate expectations established by the law in effect at the rele-

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[49] Press Release from Office of Press Secretary at the White House, Memorandum of Disapproval of H.R. 7336, ECIA, signed by Ronald Reagan, President (January 12, 1983).

vant time and "prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." *Union Pacific R.R. v. Laramie Stockyards Co., id.* at 199. These considerations are particularly relevant when the new law proposed for retroactive application attaches penalties to past conduct.

Pennsylvania accepted the grants for the years in question according to known conditions that did not include reimbursement of grant funds which were subsequently determined to be improperly spent. Pennsylvania's program was operated for years without either of the statutorily prescribed methods of enforcement being used against it. It is contrary to accepted law and unfair to Pennsylvania to require, at this time, a direct payment from the state to the federal agency by virtue of a statute passed five years after termination of the last program in question. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981); *Brewster v. Gage*, 280 U.S. 327 (1930).[50]

B. Although Penalties are Prospective Only, Remedial Provisions can be Retroactively Applied.

Remedial laws, laws that confer a benefit, or those which are procedural only, are typically applied retroactively.[51] A new penalty added to the law or a change in enforcement mechanism, however, cannot be considered

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[50] A close reading of the terms of the 1978 Amendments reveals that a prospective application is required. The section providing for reimbursement of grants based on audit exceptions requires that the Commissioner adopt procedures to resolve audit disputes, which include establishing an appeals process, before allegedly misspent funds can be collected. 20 U.S.C.A. § 2835(b) (Supp. 1982). Because the requirement to collect misspent funds clearly depends upon the use of resolution procedures not in place when the statute was passed, a prospective application is the only interpretation possible. Brewster v. Gage, 280 U.S. 327 (1930).

[51] Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937); Hallowell v. Commons, 239 U.S. 506 (1916).

simply a procedural change in a grant-in-aid statute. *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164-65 (1944). Pursuant to *Pennhurst*, states must understand the consequences of their actions if their participation in the grant program is to be considered an effective acceptance of the conditions in the grant. The penalty provisions of the Education Amendments of 1978 cannot be considered mere procedural changes for purposes of retroactive application.

In 1981 the ECIA entrusted more discretion to the local school districts and provided for significantly fewer regulatory restrictions by severely curtailing the Department of Education's ability to promulgate regulations. There is no question that these relaxed standards represent curative legislation which is applicable retroactively. *Bradley v. School Board*, 416 U.S. 696 (1974); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937). Nevertheless, since the penalty provisions included in the 1978 Amendments interfere with established rights and legitimate expectations of the state grantees when they entered the program, they would be subject to a different standard and would not be applied retroactively.

Under the relaxed standards of the ECIA, Pennsylvania's Title I programs during the years in question would be in full compliance with the law. Yet Secretary Bell has not argued for the retroactive application of these sections of the law. Instead, he has taken the completely unsupportable position that only the penalty provisions of the 1978 Amendments be applied retroactively. The 1978 Amendments, are, of course, neither the law in effect at the time this Court is rendering its decision nor the law applicable to Pennsylvania's Title I grant at the time it was accepted and implemented, but they do contain a feature that seems to appeal to the Secretary: the most severe penalty written into the law to date.

The Secretary has, in fact, taken a position in other federal courts completely inconsistent with the one he

assumes before this Court with respect to the retroactivity of the 1978 Amendments. In the Ninth Circuit, OE argued that the 1978 Amendments were not retroactively applicable to entitle California to an appeal of an adverse decision by the Title I Audit Hearing Board. Memorandum in Support of Appellee's Motion to Dismiss, at 8, 9, *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979), Pa. App. 13a. OE's position prevailed and California's appeal was dismissed for lack of jurisdiction. *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979). Similarly, in its brief to the Fourth Circuit in *West Virginia v. Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980), Pa. App. 12a, the agency argued against retroactive application of the 1978 Amendments. Brief of Respondent at 16-17, *id.*

Apparently, the Education Department's desire to see the most punitive sanctions that were ever enacted in Title I law coupled with the strictest compliance standards has led to some confusion in its thinking about retroactivity. The flexibility that the Department permits itself with regard to the law, however, is at odds with the strict adherence that is expected from the grantees. The Department's creativity on the subject of penalties would more appropriately be channelled into the substance of the programs it administers. Enforcement methods are properly restricted to the terms of the grant statute at the time it was accepted and implemented by the state recipient.

We are concerned here with grants enacted to support national goals. To achieve their beneficial purpose, federal grants depend on evenness of application and predictability of enforcement. The liberal generosity that characterizes grants makes an exact and consistent reading of the statutory words that give them substance imperative and analogy to legal principles that are designed to effectuate self-interested monetary transactions par-

ticularly inappropriate. All that is required in this case is application of the law as it was written by Congress. The law is clear and complete. The result to which it points is fair and has the virtue of certainty. This law should be given effect so that it might effectuate its purpose.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 1983

APPENDIX

I. Statutes and Regulations Involved

A. Title 1 of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, 79 Stat. 27 (superseded by Education Consolidation and Improvement Act of 1981, 20 U.S.C.A. §§ 3801-3876 (Supp. 1982)), relevant provisions printed at:

20 U.S.C.A. § 241a (1974):

§ 241a. Congressional declaration of policy

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

20 U.S.C.A. § 241f(b) (1974), providing in part:

§ 241f. Assurances from States; action by Commissioner on applications

* * * *

(b) The Commissioner shall approve an application which meets the requirements specified in subsection (a) of this section, and he shall not finally disapprove an application except after reasonable notice and opportunity for a hearing to the State educational agency.

20 U.S.C.A. § 241j (1974):

§ 241j. Withholding funds for non-compliance with assurances

Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 241e(c) or 241f(b) of this title, the Commissioner shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall not make further payments under this subchapter to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this subchapter, or payments by the State educational agency under this subchapter shall be limited to local educational agencies not affected by the failure, as the case may be.

20 U.S.C.A. § 241k(a) (1974), providing in part:

§ 241k. Judicial review—Jurisdiction

(a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its application submitted under section 241e(c) or 241f(b) of this title or with his final action under section 241j of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

* * * *

B. Title I Regulations

45 C.F.R. § 116.17 (1972), providing in part:

§ 116.17 Project covered by an application.

(a) An application for a grant under Title I of the Act by a local educational agency (other than a State agency directly responsible for providing free public education for handicapped children or for children in institutions for neglected or delinquent children) shall set forth a project for educationally deprived children residing in a project area composed of school attendance areas having high concentrations of children from low-income families or a project for serving children living in institutions for neglected or delinquent children, which project shall have been designed specifically to meet special educational needs of those educationally deprived children. The project itself shall be carried out at locations where the needs of the educationally deprived children can best be served. It may involve the participation of educationally deprived children residing outside the project area if such a participation will not dilute the effectiveness of the project with respect to children residing in the project area.

• • • •

(c) Each application for a grant under Title I of the Act by such a local educational agency, other than an application for a grant for planning, shall designate the project area or the institution or special school for which the project is designed. A project area may include one or more attendance areas having high concentrations of children from low-income families, but the project area must be sufficiently restricted in size in relation to the nature of the project as to avoid jeopardizing its effectiveness in meeting the aims and objectives of the project. Each such application shall describe the special edu-

cational needs identified with educationally deprived children residing in the project area at which the project is directed. Each local educational agency shall design its projects in such a manner, and apply them to such school attendance areas having high concentrations of children from low-income families, as will best meet the special educational needs of the educationally deprived children.

(d) A school attendance area for either a public elementary or a public secondary school may be designated as a project area if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district. In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

* * * *

(f) The project for which an application for a grant is made by a local educational agency should be designed to meet the special educational needs of those educationally deprived children who have the greatest need for assistance. However, none of the educationally deprived children who are in need of the special educational services to be provided shall be denied the opportunity to participate in the project on the ground that they are not children from low-income families or on the ground that they are not attending school at the time.

(g) Each such project must be tailored to contribute particularly toward meeting one or more of the special educational needs of educationally deprived children and should not be designed merely to meet the needs of schools or of the student body at large in a school or in a specified grade in a school.

45 C.F.R. § 116.48 (1972):

§ 116.48 State fiscal control and audit.

(a) The State educational agency shall, for that agency and local educational agencies provide for such fiscal control and fund accounting procedures as may be necessary for the proper disbursement of funds paid to the State and to local educational agencies under Title I of the Act.

(b) All expenditures by local educational agencies or by State educational agencies of Federal funds granted under Title I of the Act shall be audited either by State auditors or by other appropriate auditors. The State educational agencies shall, with due regard for Federal auditing requirements, provide for appropriate audit standards for that purpose. The results of such audits shall be used to substantiate State agency records and shall be made available to Federal auditors. Federal auditors shall be given access to such records or other documents as may be necessary to substantiate the results of such audits.

45 C.F.R. § 116.52 (1972):

§ 116.52 Withholding by the Commissioner.

(a) Whenever the Commissioner, after reasonable notice and opportunity for a hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State, or in the application of that State educational agency, approved

by the Commissioner, for a grant to establish or improve programs of education for migratory children of migratory agricultural workers, he will notify the agency that further payments will not be made to the State under Title I of the Act (or, in his discretion, that the State educational agency will not make further payments under Title I of the Act to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until the Commissioner is so satisfied, further payments under Title I of the Act will not be made to that State or payments by the State educational agency will be limited to payments to local educational agencies not affected by the failure, as the case may be.

(b) Prior to initiating a hearing under this section, the Commissioner will attempt to resolve any apparent differences between him and the State educational agency regarding the interpretation or application of the provisions of Title I of the Act and the regulations in this part, including any apparent differences with respect to the disposition of matters reported by the State educational agency pursuant to § 116.31(g). Nothing herein shall be deemed to prevent any State educational agency from seeking the advice of the Commissioner prior to disposing of such matters.

C. General Education Provisions Act Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970) (current version at 20 U.S.C.A. § 1232 (Supp. 1982)):

RULES: REQUIREMENTS AND ENFORCEMENT

SEC. 421. (a) Rules, regulations, guidelines, or other published interpretations or orders issued by the Department of Health, Education, and Welfare or the Office of Education, or by any official of such agencies, in connection with, or affecting, the ad-

ministration of any applicable program shall contain immediately following each substantive provision of such rules, regulations, guidelines, interpretations, or orders, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based.

(b) No standard, rule, regulation, or requirement of general applicability prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

(c) All such rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States.

D. Education Consolidation and Improvement Act of 1981, relevant provisions printed at:

20 U.S.C.A. § 3801 (Supp. 1982):

DECLARATION OF POLICY

SEC. 552. The Congress declares it to be the policy of the United States to continue to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965, but to do so in a manner which will eliminate burdensome, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education offi-

cials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C.A. § 3802(c) (Supp. 1982), providing in part:

Applicability of Title I Provisions of Law

Sec. 554

* * * *

(c) APPLICABILITY RULE.—The provisions of title I of the Elementary and Secondary Education Act of 1965 which are not specifically made applicable by this chapter shall not be applicable to programs authorized under this chapter.

20 U.S.C.A. § 3871(c) (Supp. 1982), provides in part:

FEDERAL REGULATIONS

Sec. 591

* * * *

(c) Regulations issued pursuant to this subtitle shall not have the standing of a Federal statute for the purposes of judicial review.

20 U.S.C.A. § 3872 (Supp. 1982):

WITHHOLDING OF PAYMENTS

SEC. 592. (a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this subtitle the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this subtitle, or affected chapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further pay-

ments under the subtitle or affected chapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the subtitle or affected chapter thereof, or (2) payments by the State educational agency under the subtitle or affected chapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

(b) Upon submission to a State of a notice under subsection (a) that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

E. Debt Collection Act of 1982 Pub. L. No. 97-365, § 10(2), 96 Stat. 1754-55 (1982), providing in part:

Sec. 5. (a) The head of an agency or his designee may, after attempting to collect a claim from a person under section 3(a) of this Act, collect the claim by means of administrative offset, except that no claim under this Act that has been outstanding for more than ten years may be collected by means of administrative offset.

* * * *

(e) For purposes of this section—

* * * *

(2) the term "person" does not include any agency of the United States, or of any State or local government.

II. Excerpts from the transcript of prehearing arguments before the Title I Audit Hearing Board, Appeal of Pennsylvania, December 7, 1977, at 51-53. (Full transcript lodged with the Clerk of the United States Supreme Court as part of the record.)

* * * *

[51] MS. HUNTING: It is my understanding from hearing the Office of Education discussion of this they are basically asserting we do not have a right to a [52] hearing. This is simply advice to the Commissioner. It appears to me from reading the statutes in this regard a hearing is provided for. We do have a right to some kind of hearing.

It does not say on the record, but some kind of hearing and we later have an appeal to the third circuit. It seems to me if we are appealing this to the third circuit we are doing this with no record whatsoever, if we are not granted a full evidentiary hearing.

MR. ARNOT: I would like to briefly respond by stating the provision which provides or requires a hearing and provides for appeal to a circuit court is not relevant here.

Those provisions concern withholding of funds or disapproval of an application, not the recovery of misspent Title I funds. They do not require a hearing in this situation, in this proceeding. They also do not provide the right of appeal to a circuit court, the case of withholding of funds or denial of approval of application.

Are we required to provide a hearing and do you have the right to appeal to the circuit court? If you want to argue by analogy to those two type situations and say we ought to have a hearing here, I set that analogy for whatever purpose and would respond by saying [53] you are receiving a hearing. The authority I would indicate I would provide on the fifth amendment the due process clause of the fifth amendment I can provide that if it is desired.

The courts have in a number of instances ruled without being overruled that States are not persons within the meaning of the fifth amendment and cannot assert fifth amendment claims of entitlement to due process, or fifth amendment entitlement on behalf of their citizenry.

MS. DONOVAN: May I ask one question. Suppose the Panel did everything I ask them to except say the Commissioner had no authority and said we would have a full evidentiary hearing and will follow administrative procedure type proceedings in the hearing. There is no appeal because it is a refund case and not a withholding?

You say there would be no right of appeal to the third circuit?

MR. ARNOT: No right of appeal.

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III. Excerpts from Brief of Respondent, at 16-17, *West Virginia v. Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980). (Copy of complete brief lodged with the Clerk.)

* * * *

Thus, the Finance Division's April 6, 1979 letter is not the "Commissioner's final action." Rather, the Commissioner's "final action" resolving West Virginia's audit appeal occurred on May 5, 1978 when he adopted the Panel's Initial Decision that $63,026 in title I funds had been misspent as his Final Decision. It is clear, therefore, that section 185 does not apply to West Virginia's audit appeal because it was enacted on November 1, 1978 —six months after the Commissioner's final action on May 5, 1978. As a consequence, unless the Education Amendments of 1978 are retroactively applied, section 195 does not confer jurisdiction on the Court.

It is a general rule of statutory construction that statutes are to be applied prospectively. *United States v. Estate of Donnelly*, 397 U.S. 286, 294 (1970). Only if there is clear statutory expression or legislative history to the contrary should a statute be retroactively applied. *Sea-Land Service, Inc. v. United States*, 493 F.2d 1357, 1369 (Ct. Cl.), *cert. denied*, 419 U.S. 840 (1974). However, nothing in the Education Amendments of 1978, or the accompanying legislative history, indicates that Congress intended section 195 to apply retroactively.

* * * *

IV. Excerpts from Memorandum in Support of Appellee's Motion to Dismiss, at 8, 9, *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979). (Copy of complete Memorandum lodged with the Clerk.)

* * * *

Thus, California's Petition for Review preceded both the enactment and the effective dates of this judicial review amendment. Additionally, the Petition for Review preceded both the enactment and effective dates of the GEPA amendment creating the Education Appeal Board, as well as the publication and effective dates of its implementing regulation.[4] For these reasons, the judicial review provision under the GEPA amendments cannot be invoked unless the pertinent GEPA amendments are retroactively applied.

The general rule of statutory construction is that statutes are only to be applied prospectively. *United States* v. *Estate of Donnelly*, 397 U.S. 286 (1970); *Sea-Land Service Inc.* v. *United States*, 493 F.2d 1357 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 840 (1974). In the past, the Ninth Circuit Court of Appeals has followed the general rule of construction, absent a clear expression of legislative intent to the contrary. *Puget Sound Power & Light Co.* v. *Federal Power Commission*, 557 F.2d 1311 (9th Cir. 1977). Neither the Education Amendments of 1978 nor its legislative history indicates that Congress intended that the amendments to GEPA apply retroactively. Indeed, the very insertion of the provision concerning the effective dates of the amendments to GEPA clearly indicates that Congress intended that these amendments only apply after March 1, 1979.

Accordingly, this Court has no basis for exercising jurisdiction in this case, and therefore should enter an order dismissing the current appeal.

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[4] The creation of the Education Appeal Board by regulation was effective on June 29, 1979 (44 Fed. Reg. 30528).

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No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2125

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

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v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent Pennsylvania and amici curiae National Association of Counties, *et al.*, and Maryland *et al.*, assert that enactment of Chapter 1 of the Education Consolidation and Improvement Act of 1981 ("ECIA") (20 U.S.C. (Supp. V) 3801 *et seq.*) repealed the explicit recoupment provision of Title I

(Section 185(b) of Title I, 20 U.S.C. (Supp. V) 2835(b)), so that the Secretary no longer has authority to recover misspent grant funds.[1] Citing the rule that a court must "apply the law in effect at the time it renders its decision," they conclude that the alleged lack of administrative authority to recover misspent Chapter 1 funds precludes collection in the instant cases (Pa. Br. 41-42; NAC Br. 15, 23-24; Md. Br. 6). This argument is incorrect.[2]

Section 554(c) of Chapter 1 states that provisions of Title I, unless "specifically made applicable by this []chapter, shall not be applicable *to programs authorized under this* []*chapter*" (20 U.S.C. (Supp. V) 3803(c); emphasis added). Section 185 of Title I (the recoupment provision) was not one of the Title I provisions specifically made applicable to the Chapter 1 program, but it does not follow that Section 185 has been repealed. Section 554(c) is expressly limited to Chapter 1 programs: *i.e.*, those funded between October 1, 1982 and September 30, 1987 (20

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[1] Chapter 1 of the ECIA was enacted as part of Title V of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. No. 97-35, 95 Stat. 463) and superseded the Title I program as of July 1, 1982. While payments under the Chapter 1 program are made on the basis of provisions in the Title I statute, Chapter 1 changed and generally reduced the substantive program requirements attached to these funds for Fiscal Years 1983-1987. See 20 U.S.C. (Supp. V) 3801 and 3802.

[2] The further contention (Pa. Br. 44) that the less stringent substantive program requirements in the ECIA should be applied retroactively to excuse the charged audit violations goes to the merits of the underlying controversy, which is not before the Court. See also N.J. Br. 47-50. In any event, we note that Congress expressly made Chapter 1 applicable prospectively, to grants awarded for FY 1983-1987 (20 U.S.C. (Supp. V) 3802).

U.S.C. (Supp. V) 3802). For Title I funds previously misspent, Section 185 is still in effect; it continues to provide explicit statutory authority for the Secretary to require repayment of the funds at issue here.

In any event, reliance on Section 185 is unnecessary, because sufficient statutory repayment authority is also provided in Section 452 of the General Education Provisions Act ("GEPA"). 20 U.S.C. (Supp. V) 1234a.[3] Section 452 mandates specific guidelines to be followed by the Secretary in resolving final audit determinations under any state-administered federal education program, including Title I and Chapter 1.[4] Section 452(e) provides specifically that a final decision of the Secretary upholding a final audit determination that federal funds have been misspent "shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with

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[3] The GEPA, enacted in 1970 as part of Pub. L. No. 91-230, 84 Stat. 164, applies to all education programs administered by the Secretary of Education, except where there is a specific statutory provision precluding applicability. 20 U.S.C. 1221(b). See also S. Rep. No. 91-634, 91st Cong., 2d Sess. 73 (1970).

[4] Part E of GEPA, which includes Section 452, was enacted in the Education Amendments of 1978 (Pub. L. No. 95-561, 92 Stat. 2347) to "consolidate most of the provisions relating to enforcement and judicial review in existing State operated programs and [establish] a comprehensive system of enforcement by the Commissioner [now Secretary] of the requirements relating to education programs." H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 141 (1978). See 20 U.S.C. (Supp. V) 3876(a); 20 U.S.C. (Supp. V) 1232d.

the Federal Claims Collection Act of 1966." 20 U.S.C. (Supp. V) 1234a(e). Accordingly, the Department of Education's final regulations for the administration of Chapter 1 explicitly recognize the Secretary's authority to recover any funds misspent under that program. 47 Fed. Reg. 52340-52366 (1982).[5]

2. Respondents' primary claim, that Title I as originally enacted contained a clear and comprehensive specification of the remedies available so that no additional remedies should be implied, is belied by their disagreement regarding precisely what remedies were specified. Thus, while New Jersey recognizes the Secretary's right to offset misspent funds against subsequent grant funds (N.J. Br. 13, 16

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[5] These regulations provide that:

> [a]n SEA shall repay to the Department the amount of Chapter 1 funds determined by the audit not to have been spent in accordance with applicable law.

47 Fed. Reg. 52348 (1982) (to be codified at 34 C.F.R. 200.57(a)(2)).

The Department originally assumed that the GEPA was not applicable to Chapter 1 (although even then it asserted the right to recover funds misspent under Chapter 1; see 47 Fed. Reg. 32856-32881 (1982)). Resolutions of both Houses of Congress disapproved regulations based on this assumption, providing clear evidence of congressional intent that the GEPA, including Section 452, applies to Chapter 1. 128 Cong. Rec. H5480-H5483 (daily ed. Aug. 10, 1982); 128 Cong. Rec. S10109 (daily ed. Aug. 10, 1982). These resolutions are apparently the "Congressional vetoes" to which respondent Pennsylvania refers (Pa. Br. 40), incorrectly suggesting that they are evidence of a congressional view that the agency has overstepped its authority in seeking to recoup misspent grant funds. Nor is such a view to be inferred from the limitations on the Secretary's authority in the new Chapter 1 programs. Instead, those limitations reflect current goals of reducing substantive federal restrictions on grant funding and reducing paperwork.

n.10, 30-33),[6] Pennsylvania vehemently denies the existence of even that right, claiming that it has no obligation to account to the federal grantor for misspent funds in the absence of a showing of criminal misappropriation (Pa. Br. 19-20 & n.18). This fundamental disagreement between respondents over the scope of the express statutory remedies available strongly suggests that the statutory remedial scheme is not spelled out in such explicit detail that it leaves no room for the implication of further remedies or the consideration of legislative intent.[7]

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[6] New Jersey appears to confuse the statutory authorization to withhold funds until the Secretary is satisfied that the state's programs have come into compliance with federal standards (20 U.S.C. 241j) with the authority to offset to recoup misspent funds (see, *e.g.*, N.J. Br. 33-34). As we explain in our main brief (at 32), these two remedies are quite distinct. Moreover, the type of offset that New Jersey asserts is the Secretary's sole means of recouping misspent funds appears to be precisely the remedy that the court of appeals rejected as inappropriate (Pet. App. 21a-22a). Finally, it is simply incorrect to contend, as New Jersey does (N.J. Br. 3), that the withholding of future grant funds is a less severe remedy than recoupment, particularly since, before the 1978 Amendments, the withholding contemplated by 20 U.S.C. 241j would have required suspension of *all* Title I payments to a State or LEA. The offset proposed by New Jersey, therefore, is in many ways more drastic, and it penalizes Title I beneficiaries twice: once at the time of the original conversion and again at the time of the later reduction in the federal grant.

[7] To rebut the clear evidence of legislative intent demonstrated by the 1974 statute of limitations (Gov't Br. 33-34), Pennsylvania states that "[i]t must be remembered that the statute of limitations is part of GEPA and is generally applicable to all education grant programs, some of which have repayment sanctions" (Pa. Br. 32; footnote omitted). But the 1974 limitations provision on which we rely was an

Moreover, respondents misapprehend the utility of even those remedies that they concede the Secretary may employ under Title I. Respondents suggest that the Secretary is limited to disapproving a state application that fails to conform to the requirements of the statute or withholding Title I funds until the state program comes into compliance (see N.J. Br. 17, 37; Pa. Br. 18). But these remedies have no effect on a state's failure to comply with program requirements in the past. And even in the case of a continuing violation, the disapproval sanction has only a prospective effect and cannot provide make-whole relief. It is therefore an essential and inherent part of any grant-in-aid scheme, including Title I, that the federal grantor be empowered to recoup payments applied by recipients in violation of the terms of the grant, in addition to any other remedies or sanctions expressly provided. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979) (implying a private action for rescission and restitution under the Investment Advisers Act of 1940, because "when Congress declared in [the Act] that certain contracts are void, it intended that the customary legal incidents of voidness would follow").

3. Respondents argue that Section 4 (31 U.S.C. 953) of the Federal Claims Collection Act of 1966

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amendment to the Elementary and Secondary Education Act, and was not part of GEPA. See 20 U.S.C. 884. Furthermore, both the language of the statutory provision and the legislative history specifically refer to the Title I program. See *ibid.*; H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 78-79 (1974). Although there is also a statute of limitations provision in GEPA, which was enacted as part of the 1978 Amendments (see 20 U.S.C. (Supp. V) 1234a(g)), that was not the provision cited in our brief.

demonstrates that the Act was not intended to provide an independent source of authority for administrative collection efforts (Pa. Br. 34; N.J. Br. 37 n.18).

Respondents misconstrue Section 4, which states that "[n]othing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims" (31 U.S.C. 953). This simply means that the Act does not purport to authorize an agency to bring a collection suit in federal court; instead, the Act preserves the requirement that agencies refer claims to the Department of Justice for litigation.

Legislative history supports the plain language. The main purpose behind enactment was "to avoid unnecessary litigation." S. Rep. No. 1331, 89th Cong., 2d Sess. 1 (1966). Although agencies previously had power to collect debts, they lacked the related power to compromise or settle claims. As a result, they had to refer all disputed cases—regardless of merit or the prospect of successful collection—to the Department of Justice for litigation. In order to reduce the resulting court congestion and eliminate waste of resources, Congress passed the Claims Act to confer additional authority on agencies to compromise or settle claims short of litigation. Section 4 merely makes clear that agency authority to collect and to compromise or settle claims does not also include the authority to litigate; that authority remains with the Department of Justice.

Respondents' construction of Section 4 is inconsistent with the Act's unequivocal directive that all agencies "shall attempt collection of all claims * * * arising out of the[ir] activities" (31 U.S.C. 952(a)). If an agency has no express independent authority to collect claims administratively, according to respondents

the agency would have no authority to comply with that requirement.[8]

4. Respondents assert that, for a variety of reasons, it would be unfair or otherwise inappropriate to require them to repay the misspent funds. None of the reasons asserted has merit, and in any event Congress resolved this issue against the States when it rejected a proposal that would have relieved state grantees of their obligation to repay Title I funds misspent before 1978 (Gov't Br. 36 n.46).[9]

a. Respondent Pennsylvania asserts that its violations of Title I standards were, at most, technical ones, resulting in no unjust enrichment to the State (Pa. Br. 28-29).[10] But if, as the Education Appeal

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[8] Nor does respondents' construction comport with the historical understanding of the Department of Justice and the Comptroller General, which has been accepted by Congress (see Gov't Br. 25-31).

[9] We note in addition that respondents' repeated assertions (see, *e.g.*, Pa. Br. 29-30) that recoupment is inconsistent with the basic policies of the Title I program is belied by the fact that Congress expressly provided that remedy in the 1978 Amendments.

[10] Pennsylvania did not contest the substance of the audit violations before the court of appeals. New Jersey did contest the findings, but the court of appeals did not reach those issues.

Respondents paint a picture of "an innovative, untested federal program" (N.J. Br. 21), filled with obscure requirements, and they attempt to convey the impression that recoupment would be inequitable because numerous good faith deviations from statutory and administrative conditions are inevitable. Needless to say, the reasonableness of a grantee's interpretation of an ambiguous regulation is a factor considered by the Secretary in determining whether to seek recoupment of wrongfully expended grant funds (see Pet. App. 65a-68a). Moreover, the grantee is always free to seek the Secretary's advice concerning program requirements. How-

Board found, federal monies were spent for projects that were not allowable under the federal statute and regulations, the grantees were enriched in a manner not contemplated by the statute, because they were enabled to provide services to their citizens desired by the grantees but not authorized by the federal program. That is sufficient unjust enrichment to require repayment of the misspent funds. Respondent's additional claim (see, *e.g.*, Pa. Br. 21) that administrative recoupment would serve no purpose under Title I overlooks both the deterrent value of requiring restitution and the "grantback" provision of Section 456 of the GEPA (20 U.S.C. (Supp. V) 1234e), which authorizes the Secretary to return to the State or LEA up to 75% of the repaid funds for approved programs benefitting eligible children (see Amicus Curiae Lawyers Comm. Br. 7, 19-22).[11]

b. Respondents' claims that the federal government shares the responsibility for the improper expenditures, and failed to warn the States that they would be required to repay sums improperly spent,

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ever, the Secretary's decisions to seek recoupment in these cases are based on clearly stated and critical Title I requirements that had been in effect for several years at the time of the violations (see, *e.g.*, J.A. 15-16, 59).

[11] The grantback funds must be used "to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception" (20 U.S.C. (Supp. V) 1234e(a)(2)).

The grantback provision has in fact been exercised by the Secretary on several occasions. See, *e.g.*, 47 Fed. Reg. 20343-20345 (1982) (grantback to Wisconsin of 75% of repaid funds determined to have been misapplied by the State during the 1967-1972 audit period); 47 Fed. Reg. 23002-23003 (1982) (grantback to the District of Columbia of 75% of repaid funds misapplied during the audit period from 1973-1977).

are likewise unavailing. The suggestion (Pa. Br. 18-21) that the Department is at fault for failing to discover the violations more promptly ignores the fact that in Title I, as in many other grant-in-aid programs, the grantee states are given primary responsibility for ensuring that monies are properly expended. The federal agency simply does not have the resources, and is not expected, to perform comprehensive policing and enforcement activities. Cf. *New Jersey* v. *Department of Health & Human Services*, 670 F.2d 1284, 1296-1298 (3d Cir.), cert. denied, No. 81-2061 (Oct. 4, 1982).[12]

Respondents' claim (Pa. Br. 37-38, 43; N.J. Br. 35, 37-38) that the States were not on notice of their repayment obligation is equally unconvincing (Gov't Br. 40-41).[13] Respondents make much of the fact that

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[12] New Jersey's statement (Br. 3) that the LEA's applications are sent to the federal government incorrectly suggests that the Department was put on notice of the violations as they occurred. In fact, Title I provided that the LEA's applications were to be sent to, and approved by, the SEA. 20 U.S.C. 241e(a). Only general assurances of the State were provided to the federal government. 20 U.S.C. 241f(a).

[13] New Jersey unsuccessfully argues (Br. 24 n.14) that its repayments of pre-1978 grant funds do not suggest recognition of that obligation. The fact that its $4000 repayment was part of a settlement does not, of course, alter the fact that the State submitted payment for its audit violation. As to the $1306 payment, New Jersey asserts that its "records disclose no such repayment"; it then assumes that the amount "represents the portion of the Newark audit exception for the 1970-71 school year which was not barred by operation of the statute of limitations." New Jersey's assumption is wrong. In 1973, New Jersey repaid $1306 for unallowable Title I expenditures in the Atlantic City School District. These disallowed expenditures were discovered in an earlier audit of Title I programs in the State (Audit Control No. 90067-02).

pre-1978 agency regulations do not specifically refer to repayment, but do explicitly mention disapproval and withholding. Pa. Br. 33; cf. N.J. Br. 44 n.19. But this merely indicates that the agency, like Congress, did not deem it necessary to spell out so fundamental a concept as the one that converted funds must be repaid. See Amicus Curiae Lawyers Comm. Br. 8-10. It is also apparent that the regulations merely tracked the express provisions of the Title I statute, which at the time did not provide expressly for recoupment. Moreover, the existence of claims collection regulations incorporating the Federal Claim Collection Act Standards (see 45 C.F.R. Part 30 (1968)) eliminated the need to provide for specific repayment procedures in the Title I regulations.[14] See also Gov't Br. 8-9, 28-31, 32-33 (audit provisions).

In sum, the Secretary has clear authority to recover administratively the monies owed, and he retains broad discretion to exercise that authority by appropriate collection devices subject to judicial review for arbitrariness.[15]

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[14] Contrary to arguments made by Pennsylvania (Br. 6-7) and amicus curiae National Association of Counties (Br. 11, 24-26), the Secretary was not required to promulgate a regulation before he could demand recovery. Under the Title I statute, the Secretary is expressly authorized to administer the Title I program, issue regulations and "perform such other functions as he finds necessary to carry out the provisions of [Title I]." 20 U.S.C. 242(b). Likewise, the procedures of the Title I Audit Hearing Board did not have to be published as formal regulations. Procedural or interpretative rules are exempt from the rulemaking requirements of the Administrative Procedure Act. 5 U.S.C. 553(b)(3)(A).

[15] Pennsylvania incorrectly asserts (Br. 24-25, 44-45) that the Secretary previously took the position that there is no judicial review available to grantees in audit disallowance cases, and that the 1978 Amendments should not be applied

c. New Jersey argues for the first time in this Court that "principles of federalism," and more specifically the Tenth Amendment as interpreted in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), preclude requiring the states to repay misspent Title I funds (N.J. Br. 19, 26-32). *National League of Cities*, however, involved a limitation on Congress's power under the Commerce Clause. See 426 U.S. at 841, 852 n.17. Title I, on the other hand, is an exercise of Congress's Spending Power.

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retroactively. It refers to arguments made by the agency in two cases. (*West Virginia* v. *Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980), and *California State Board of Education* v. *Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979)), as well as statements made at an oral argument on prehearing motions in its case before the Title I Audit Hearing Board.

The *West Virginia* and *California* cases involved decisions of the Title I Audit Hearing Board that became final prior to enactment of the 1978 Amendments. Consequently, the Department argued that there was no *direct* review in the court of appeals, either under the Title I provision granting judicial review of withholding actions (20 U.S.C. 241k) or the 1978 Amendments, from the Commissioner's final decision to require the repayment of misspent funds from these states. With regard to the 1978 Amendments, the agency argued that the judicial review provisions should not be applied retroactively to audit cases that had reached a final administrative decision prior to enactment of those provisions. These arguments did not suggest that *no* judicial review was available; clearly, the States could have obtained judicial review of these decisions in district court pursuant to the APA.

Similarly, the oral argument before the Title I Audit Hearing Board in Pennsylvania's case predated by a year the 1978 Amendments. In the excerpt referred to by Pennsylvania, the Department correctly stated that Pennsylvania did not at that time have a right of direct appeal to the court of appeals. Pennsylvania would have had a right to judicial review in district court, however, had its case reached a final decision prior to enactment of the 1978 Amendments.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce [state] governments * * * to cooperate voluntarily with federal policy.

Fullilove v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). No new substantive obligations are being imposed on the States here; respondents were aware from the outset of the Title I program that grant funds could be used only in conformity with express statutory and regulatory conditions (see Gov't Br. 40).

In any event, even judged by *National League of Cities* standards, the Secretary's recoupment decision —seeking the return of *federal* monies used by the States for purposes inconsistent with the *federal* grant—raises no problems under the Tenth Amendment. The State's arguments are substantially answered by this Court's recent decision in *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), which explained that "the principle of immunity articulated in *National League of Cities* is a functional doctrine, * * * whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence' not be lost through undue federal interference in certain core state functions" (slip op. 8-9; citations omitted). Accordingly, the Court emphasized (*id.* at 11-15), it is necessary in each case to consider the degree of federal intrusion into integral state functions. Finally, the Court rejected the claim (*id.* at 13-14) that federal legislation imposed unacceptable

consequential costs on state programs—a claim similar to New Jersey's budgetary arguments here (N.J. Br. 28-29).

Respondents' assertions that the obligation to repay misspent funds may prove disastrous to the states (Pa. Br. 29; N.J. Br. 29) overlook the fact that the audit exceptions are quite small in comparison to the total amount of Title I funds received by the State. Thus, although the Secretary here seeks recoupment of approximately $1 million from New Jersey, and less than half that from Pennsylvania (Gov't Br. 10-11), the Department of Education informs us that New Jersey has received almost $1 billion and Pennsylvania more than $1.5 billion in Title I and Chapter 1 awards since the program's inception in 1966 [16] (see also Pa. Br. 11 n.13 (amount at issue here "represents only .1% of Pennsylvania's total grant for the years in question")). Given these vast federal awards to respondents for their educational programs, it is most unlikely that repayment of the sums involved here will threaten the financial integrity of their educational systems.[17] Moreover, respondents' dire financial predictions are based on the assumption that the Secretary seeks to require them immediately to forward a check in the full amount owed. The propriety, however, of any particular mode of collection is not properly before this Court. Resolution of that specific issue must await disposition of the case on the merits—presumably on

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[16] These totals include all Title I and Chapter 1 funds awarded to the States, including funds for the LEA programs, for state agency programs for migrant, handicapped and neglected and delinquent children, and for State administration.

[17] In addition, the grantback provision (see note 11, *supra*), would allow the affected State to benefit from up to 75% of the repaid funds.

remand to the court of appeals—and the Secretary's as yet unexercised choice of a specific method of collection (see Gov't Br. 20-21).[18]

CONCLUSION

For the reasons stated here and in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

APRIL 1983

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[18] The Secretary has a variety of options in collecting debts. By first demanding a direct repayment, the Secretary was simply acting in accordance with the Federal Claims Collection Standards. 4 C.F.R. 102.2. If direct repayment is not made, "[c]ollections by offset will be undertaken * * * in every instance in which this is feasible." 4 C.F.R. 102.3(a). Thus, the Secretary always retains the option of recovering misspent Title I funds through some type of offset if a State does not comply with the demand for direct repayment of the funds (Gov't Br. 20-21).

The burden of repaying misspent Title I funds is also tempered by the fact that repayments may be made in installments "over a period not to exceed three years." 20 U.S.C. (Supp. V) 2835(b); see also 4 C.F.R. 102.10 (collection in installments permitted under the Federal Claims Collection Standards).

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No. 81-2125

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF AMICUS CURIAE OF THE COLLEGE OF THE SEQUOIAS AND THE NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS IN SUPPORT OF BRIEFS FOR THE RESPONDENTS

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The College of the Sequoias and the National Association of Student Financial Aid Administrators submit this brief amicus curiae in support of the Briefs of Respondents State of New Jersey and Commonwealth of Pennsylvania. The College of the Sequoias and the National Association of Student Financial Aid Administrators urge the Court to uphold the decision of the Third Circuit in The State of New Jersey Department of Education v. Hufstedler, 662 F.2d 208 (3d Cir. 1981).

INTEREST OF AMICUS CURIAE

The College of the Sequoias and the National Association of Student Fianancial Aid Administrators ("NASFAA") are greatly interested

in this Court's decision on the issues before it in the appeal of New Jersey v. Hufstedler, supra. Their interest stems from the Department of Education's administration of student financial aid assistance programs pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. Sections 1070-1098. As in the situation presented by Respondents, the Department of Education has attempted to recoup financial aid funds from the College of the Sequoias and member institutions of NASFAA with no statutory authority to support its actions. The funds in question have already been paid to students and the Department of Education contends that they were

paid in violation of the Department's regulations.

The National Association of Student Financial Aid Administrators ("NASFAA") is a non-profit corporation of postsecondary institutions, individuals, agencies and students interested in promoting the effective administration of student aid in the United States. NASFAA has a membership of 2,751 institutions and is the largest higher educational association headquartered in Washington D.C. Members of the NASFAA administer approximately eighty percent (80%) of all Title IV and Health Professions student financial assistance. The corresponding

monetary amount is approximately $7.8 billion. The Department of Education contends that approximately $700 million dollars of student financial assistance has been misspent. NASFAA disagrees with this figure on the basis that the quality control study from which the figures are derived is not accurate. NASFAA has a very real interest in the outcome of this case inasmuch as the Department of Education has attempted to recoup what it believes to be misspent financial aid funds without any statutory authority.

The College of the Sequoias participates in the Title IV financial aid programs pursuant

to the terms of 20 U.S.C. Section 1070, et seq. It is interested in this case because the Department of Education has demanded reimbursement of approximately Three Hundred Thousand Dollars ($300,000.00) based upon its unilateral determination that the College spent Title IV funds between the years 1974 to 1979 in violation of the Department's regulations.

The Department of Education's administration of Title IV funding is strikingly similar to the administration of Title I funding in the following respects:

1. participating institutions must comply with certain statutory requirements in order to receive Title IV

funds on behalf of eligible students;

2. participating institutions, (specifically the College of the Sequoias,) receive Title IV funds to be dispersed to eligible students largely by way of a cash advancement method (as opposed to a cash reimbursement method);
3. the Department of Education audits participating institutions to ensure compliance with the pertinent statutory requirements.

The Department's demand for reimbursement from the College of the Sequoias followed the Department's audits of the

College's compliance with Title IV. In August of 1978, the Office of Education conducted a program review of the College's Student Financial Aid programs. The Department of Health, Education and Welfare (predecessor to the Department of Education) identified several weaknesses in the College's administration of financial aid programs. These areas included lack of adequate documentation in the institutional files and failure to comply with revisions in the regulations. The Department instructed the College to perform a comprehensive audit of its financial aid programs covering the last five years of program participation in acordance with the

HEW Audit Guides.

The College did retain a Certified Public Accountant who issued an audit of Basic Education Grant Programs for the years of July 1, 1974 to June 30, 1979. The CPA concluded that the College had implemented proper procedures to comply with Title IV requirements. He also determined that approximately Seven Hundred Eighty-One Thousand, Six Hundred Fifteen Dollars ($781,615.00) had been given to students who did not have "affidavits of educational purpose" in their files. The College subsequently received permission to attempt to obtain and retroactively restore the missing affidavits to the student files so

that the Department of Education issued a final audit determination and demanded reimbursement of $292,82.00 for those files which did not contain the restored affidavits of educational purpose.

This demand was made despite the fact that the sole remedies for noncompliance with Title IV are the limitation, suspension or termination of the eligibility for any program or the imposition of a civil penalty; and despite the fact that no opportunity for a due process hearing was provided.[1]

Moreover, when the lack of due process was specifically addressed to the Department of Education, it still did not offer any form of due process. The

situation is all the more egregious when one recognizes that the reimbursement is based on the failure of the student's to sign affidavits of their intention to use the funds for educational purposes. (20 U.S.C. §§1091). There is no claim by the Department of Education that the funds were not actually used for their lawful and intended purposes. The College of the Sequoias was denied the opportunity to demonstrate that the funds were in fact used for educational purposes.

In compliance with 20 U.S.C. Section 1094, the Department has adopted regulations regarding procedures for fines, suspension, limitation and terminations. These

regulations provide for notice and an opportunity for a hearing as specified by the statute. 34 CFR 668.71 et seq. Included with these regulation is a provision entitled "Reimbursements, Refunds, and Offsets." 34 CFR 668.83. The Department cites 20 U.S.C. 1094 for authority to enact this regulation.[2] Again, Section 1094 provides no authority whatsoever for reimbursements, refunds or offsets.

Compounding the Department's lack of authority is the fact that it provides for no form of due process in its reimbursement regulation. That is, once the Department determines unilaterally that an institution

has misspent funds it gives itself the right to reimbursement of what it deems to be misspent funds, without the opportunity for the institution to respond or have entitlement to a hearing. In short, the Department is prosecuter judge, jury, and appellate tribunal[3]

The reimbursement regulation became effective in December, 1980 after the College of the Sequoias had allegedly misspent the funds by providing them to students who may not have signed affidavits of educational purpose.

Consequently, the implications of this Court's decision in the instant appeal are of major significance to NASFAA and its 2751 member institutions such as the College of Sequoias.

SUMMARY OF ARGUMENT

The Third Circuit of Appeals decision in New Jersy v. Hufstedler supra, should be upheld in light of its statutory interpretation and conclusion that a federal agency is limited to the remedy Congress prescribes. Further, its holding that the Government's common law right to recoupment should be exercised by filing an action in a court of competent jurisdiction is both lawful and equitable. If the law were to be held otherwise, the federal agency could, on its own whim, demand recoupment.

In the alternative, and without conceding the argument as stated above, the College of the Sequoias and NASFAA urge this Court to limit

any decision to overturn the New Jersey case to those situations where adequate due process has been provided.

ARGUMENT

I

THE THIRD CIRCUIT DECISION IN NEW JERSEY v. HUFSTEDLER IS A WELL-REASONED APPLICATION OF THIS COURT'S HOLDING IN PENNHURST v. HALDERMAN AND SHOULD BE UPHELD TO LIMIT THE OFT-TIMES UNBRIDLED DISCRETION OF FEDERAL AGENCIES

This Court specifically held in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981) that when Congress seeks to impose conditions

on the grant of moneys, it must do so unambiguously:

> "Turning to Congress' power to legislate pursuant to the Spending Power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. (citations omitted) Unlike legislation enacted under §5, however, legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally

imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' (citations omitted). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of moneys, it must do so

unambiguously. (fn. omitted) (citations omitted). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." Id. 101 S.Ct. 1539-1540

Relying on this principle, the Third Circuit held that the Department of Education did not have the authority to recoup what it determined to be misspent funds absent statutory authority to do so. The Court rejected the Department's argument that the 1978 amendments to the Elementary and

Secondary Act of 1965, as amended 20 U.S.C. §§2701 et seq. should be applied to funds misspent prior to 1978. The Court held that under the Pennhurst rationale recoupment was not an unambiguous condition upon which the Title I grants were made prior to 1978.

Title IV of the Higher Education Act of 1965 as amended, 20 U.S.C. Sections 1070-1098 likewise does not provide for recoupment of allegedly misspent funds. Moreover, Title IV has never been amended to provide for administrative recoupment as was Title I. The failure of Congress specifically to provide authority for the Department of Education to

demand recoupment in the Title IV programs in the face of Congress' grant to the very same Department of Education the authority to recoup funds in the Title I programs is clear Congressional intent that no such right exists under Title IV.

Thus, if this Court were to hold that federal agencies have the authority to demand recoupment absent Congressional authority, it would be an obvious contradiction of Congressional intent. This result is all the more apparent when it could be applied to each agency of the federal government. Here, we are only considering what must be a reasoned and conscious Congressional inconsistency,

(i.e. providing for recoupment in Title I and not Title IV) in the Department of Education's administration. The effect on all of the grant-in-aid programs could be devastating.

Recognizing that recipients of federal grants should not be entitled to misappropriate funds without Governmental recourse, it is rational that this recourse should be limited to those remedies Congress has specifically provided. As the Court in Hufstedler stated in its holding that the Department of Education did not have the right to administrative recoupment:

> "...[W]here a legislative body provides for liability

coupled with a special statutory remedy, 'that remedy and that alone, must be employed.' Pollard v. Bailey, 87 U.S. (20 Wall.) 520, 527, 22 L.Ed. 376 (1874). See also National Railroad Passangers, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed. 2d 646 (1974) ('A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy..., courts should not expand the coverage of the statute to subsume other remedies.')" 622 F.2d at 216 [Emphasis added]

The Court went on to hold that

in advance-funding schemes such as Title I, the agency may only rely on a common-law right to recoupment by maintaining a civil action in a court of competent jurisdiction, stating that:

> "Administrative agencies, however, are purely creatures of statute, and their authority is statutorily circumscribed. To allow an agency to assume powers that it considers appropriate in carrying out its duties but which have not been allotted to it by Congress would attribute legislative powers to the excutive branch and disturb the balance in our

tripartite system of government. More important, perhaps, would be the absence of due process in a system where agencies charged with administering the multitude of federal grant programs were free to augment or abridge the rights and obligations forming the contractual basis of the grantees' participation." 662 F.2d at 218.

This holding is supported by the Supreme Court decision relied upon by the Department of Education in arguing that it has the common law right to recoupment, United States v. Wurts, 303 U.S. 414 (1938). In

that case a judicial suit rather than an administrative remedy was initiated in order to recover moneys.

Further, the situation presented by the College of the Sequoias is a superb example of the Department of Education's use of unbridled discretion. Here, not only is the Department demanding reimbursement without statutory authority, but it is doing so without any due process whatsoever. There has been no response to the College's contention that it has not been provided due process. This situation, while a major concern to the College, is one small example of the current abuse of discretion

and a mere foreshadowing of the devastating effect a decision to overrule the Third Circuit opinion could have on federal grant recipients.

It also should be noted that the Third Circuit decision is particularly appropriate when compared with the case which is in conflict with the Third Circuit, i.e., State of West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981). In that case, the Court made no reference to this Court's decision in Pennhurst nor did it discuss the legislative history of Title I. It was not a reasoned decision; rather, it made a bold conclusion that the Department of Education could apply

the 1978 amendments retroactively. It further held that absent those amendments, the Department of Education had the right to recoupment. It did not even consider the issue of why, if the Department had always had that right, Congress felt it necessary to amend the statute to provide specifically for the right to recoupment.

Support for the New Jersey v. Hufstedler decision is found in State of California v. Block, 663 F.2d 855 (9th Cir.1981) and Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), cert.denied, 102 S.Ct. 1993 (1982). In the Ninth Circuit Block Opinion, the Court

held that the Department of Agriculture did not have the authority to issue a regulation which did not conform with the statutory provisions.[4] It also noted that the current statute could not be applied retroactively, citing Pennhurst State School and Hospital v. Halderman, supra, and State of New Jersey Department of Education v. Hufstedler, supra.

Similarly, the Seventh Circuit in Lieberman held that the prohibition of sex discrimination in the Education Amendments of 1972 did not provide a damages remedy to an individual allegedly made a victim of sexual discrimination. The Court primarily relied on Pennhurst in reaching its decision.

In summary, if this Court does not uphold the Third Circuit opinion, federal agencies could then administer programs with unfettered discretion, assessing penalties and recoupment as their own departments deem them appropriate. It would virtually nullify Congressional intent in those situations in which Congress has specified limited remedies.

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II

ASSUMING ARGUENDO THAT THIS COURT DECIDES TO OVERRULE NEW JERSEY v. HUFSTEDLER, SUCH A HOLDING SHOULD BE LIMITED TO THOSE SITUATIONS WHERE ADEQUATE DUE PROCESS HAS BEEN PROVIDED.

A logical extension of granting federal agencies the authority to demand recoupment where a statute specifies remedies other than recoupment is the demand for reimbursement without any form of due process. This situation is not mere conjecture. As set forth previously, the Department of Education is engaging in this very activity. With absolutely no statutory authority it has adopted

a regulation providing for reimbursements and offset. This regulation is not accompanied by any due process rights, contrary to the regulations and statute regarding suspension, limitation, termination and fines.

Therefore, it is necessary for this Court to narrow any decision providing for an agency's right to reimbursement to those situations where adequate due process has been provided.

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CONCLUSION

The College of the Sequoias and the National Asociation of Financial Aid Administrators urge this Court to uphold the Third Circuit decision in State of New Jersey Department of Education v. Hufstedler, supra for the above stated reasons.

Respectfully submitted,

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College of the Sequoias and
National Association of
Financial Aid Administrators

FEBRUARY 1983

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20 U.S.C. Section 1094 (b)(1)(d) provides:

"Notwithstanding any other provisions of this subchapter and part C of subchapter I of chapter 34 of Title 42, the Secretary is authorized to prescribe such regulations as may be necessary to provide for [the] limitation, suspension, or termination of the eligibility for any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 of any otherwise eligible institution, or the imposition of a civil penalty under paragraph (2)(B) wherever the Secretary has determined after reasonable notice and opportunity for hearing on the record, that such institution has violated or failed to carry out any provisions of this subchapter and part C of subchapter I of chapter 34 of Title 42, except that no period of suspension under this section shall exceed sixty days unless the institution and Secretary agree to an extension or unless limitation or termination proceedings are initiated by the Secretary within that period of time." [Emphasis added]

[2] 20 U.S.C. Section 2132(a)(2) provides that regulations issued by the Department of Education "... shall contain immediately following such substantive provisions of such regulations, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based."

[3] Interestingly, Title IV programs are not covered by the General Education Provisions Act, specifically 20 U.S.C. §1234a regarding the due process proceudres. Further, there has been no amendment to the Higher Education Act specifically authorizing repayment of misspent funds as there was in Title I.

[4] This case is of particular importance to the College of the Sequoias and NASFAA since the Department of Education has similarly adopted a regulation (reimbursement) for which it has no statutory authority.

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IN THE

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OCTOBER TERM, 1982

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Petitioner,

v.

STATE OF NEW JERSEY, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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R. Silverstein, A Description and Analysis of H.R. 10891—A Bill Reorganizing & Amending Title I of the Elementary & Secondary Education Act (1978) 16n

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 19 years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The Lawyers' Committee has had a long-standing interest in Title I of the Elementary and Secondary Education Act because of the statutory emphasis upon meeting the needs of poor and disadvantaged children. In the early 1970's the Committee began to monitor federal administration of the Title I program, in order to determine whether states and local school districts were using

their grants to operate projects which carried out this basic purpose. These activities greatly intensified in 1975 with the creation of the Committee's Federal Education Project. This Project has become a major informational resource for parents of Title I participants and Title I staff in local educational agencies, and it has provided legal representation to parents of Title I students in litigation and administrative complaint proceedings. In 1976, pursuant to a contract with the National Institute of Education, the Lawyers' Committee established a separately staffed unit, the Legal Standards Project, to conduct research on the legal framework of Title I. This project subsequently provided extensive recommendations for legislative changes, many of which were incorporated in the Education Amendments of 1978, P.L. 95-561. The Congress' reliance upon the work of the Legal Standards Project is acknowledged in the legislative history of the 1978 amendments.

Throughout this long involvement with Title I, the Lawyers' Committee has been concerned with vigorous enforcement of the programmatic and fiscal restrictions embodied in the federal statute and regulations. Compliance with these requirements is essential, in our judgment, to insuring the educational effectiveness of compensatory instruction funded by the federal government; and experience demonstrates that full compliance depends in significant part upon the expectation that disregard of statutory conditions upon the expenditure of funds will be followed by audit and meaningful sanctions. Thus, the Committee is alarmed by the holding below that New Jersey and Pennsylvania need not reimburse the federal government for grant funds admittedly misexpended in prior years' Title I programs. We file this brief *amicus curiae** in order to share these concerns with the Court

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* Letters of consent by all parties to the submission of this brief are being filed with the Clerk in accordance with Rule 36.1 of the Rules of this Court.

and to give the Court the benefit of our long and close association with the statute in question—experience which leads us to the conclusion that the ruling below is contrary to the language of the statute and to the consistent intent of Congress since its initial enactment in 1965.

STATEMENT

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act (ESEA)[1] to provide federal funds to local school districts for programs meeting the needs of educationally deprived children in areas with high concentrations of low-income families. In order to ensure that Title I funds reach their intended beneficiaries, the statute includes specific provisions with which state education agencies (SEAs) and local education agencies (LEAs) must comply. Title I funds may not be used to replace local school funds, but must be used to provide supplemental services above those normally provided. State and federal audits are authorized to assess local compliance with statutory criteria.

New Jersey and Pennsylvania ("States") have participated in the Title I program since its inception and were aware of the various statutory and regulatory requirements for participation. In the early 1970's audits conducted by the United States Department of Health, Education and Welfare Audit Agency (HEWAA) determined that both States had misapplied substantial amounts of federal Title I funds during prior years.

Although these cases did not go through the appeals process simultaneously, each involved the same procedural steps. Final audit reports were issued in April (Pennsylvania) and June (New Jersey) of 1975. The Deputy Commissioner for Elementary and Secondary Education in the Office of Education, in May (Pennsyl-

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[1] Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29.

vania) and June (New Jersey) of 1976, issued final determination letters sustaining the findings and ordering both States to refund the amounts determined to have been misspent. The States then filed applications for review with the Title I Audit Hearing Board.[2] After hearings, the successor Education Appeal Board concluded that both States should repay the funds found by the HEWAA to have been misspent, although the original amounts were reduced pursuant to the five-year statute of limitations on repayment of misspent funds. The Board's decisions were subject to a comment period during which the Secretary declined to review them. Accordingly, the Board's decisions became the final decisions of the Department.

New Jersey and Pennsylvania then filed petitions for review with the United States Court of Appeals for the Third Circuit. Although the petitions were never formally consolidated, the Third Circuit issued a single opinion reversing the orders of the Department of Education. The court of appeals held that even if the funds were misspent, the government did not have the statutory authority, before 1978, to require repayment through administrative proceedings.[3] The Court expressed con-

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[2] The Title I Audit Hearing Board was established by the Department of Education in 1972 to provide state education agencies with an impartial tribunal to hear audit appeals. 37 Fed. Reg. 23,002 (1972). On June 29, 1979, the Education Appeal Board (EAB), created by Pub. L. No. 95-561, 92 Stat. 2143, 2347 (1978) (codified at 20 U.S.C.S. § 1234) assumed jurisdiction of all cases then pending before the Title I Audit Hearing Board. 44 Fed. Reg. 43,807 (1979).

[3] The government also argued that it had a common law right, independent of statutory authority, to recover money distributed contrary to law or under a mistake of fact. The court did not decide this issue. The court found that this governmental right of recovery is administratively exercised by set-offs and that the advance funding method of distributing Title I funds does not lend itself to this means of enforcement. Thus, the court held, even if the government retains its common law right, it may enforce such right only by maintaining a civil action in a court of competent jurisdiction.

cern that the intended beneficiaries of Title I monies would lose valuable Title I services if New Jersey and Pennsylvania were now forced to repay misspent funds.

SUMMARY OF ARGUMENT

I.

The federal government, under Title I, gave the states money for specific, defined purposes, and for no other. When the states used such funds for their own, unauthorized, purposes, they were in the same position as a trustee who converts trust funds to his own use. Under such circumstances, there should be no serious question as to the duty of the states to make restitution for misused funds. That duty is inherent in the terms under which the funds were received and need not be spelled out in the statute.

Congress showed its understanding that misspent funds were subject to repayment by the states when in 1974 it enacted a five-year statute of limitations on the repayment obligation of the states.

II.

Since the duty to repay misused funds is clear, the real issue here is how that obligation may be enforced. The Third Circuit erred in holding that, prior to 1978, the federal government lacked authority to recover misspent Title I grant funds through audit, administrative determination, and demand for restitution.

Since the Title I program began, the Department of Education (or its predecessor agencies) have audited state and local projects and demanded repayment of funds determined to have been misspent. Congress has always been fully aware of these activities and has repeatedly enacted legislation to facilitate the audit-collection process. In 1970 the statute was amended to specify what records grant recipients were required to

keep to facilitate effective audits, and to give the Comptroller General and Commissioner of Education access to those records for the purpose of conducting audits. The legislative history of this provision demonstrates Congressional understanding that the audit process would end in repayment of funds to the federal government if the audits revealed unauthorized expenditures. A 1974 amendment, which placed a five-year statute of limitations on the repayment obligation of grantees, was based upon Congressional acceptance of the existing administrative process.

The 1978 amendments, which explicitly gave the Commissioner of Education authority to demand repayment of misspent funds, were enacted in response to a well-documented decline in audit and recovery activity on the part of the Office of Education. Contrary to the Third Circuit's holding, these statutory changes did not give the Department authority which it did not previously possess; rather, they were designed to establish mandatory standards for the audit process and to authorize judicial review in the Court of Appeals.

III.

Even if the Department lacked explicit statutory authority, prior to 1978, administratively to demand repayment of misspent funds, it clearly has this authority now. The 1978 statutory amendments should be applied to the audits in the instant case, pursuant to the well-settled rule that a court must apply the law in effect at the time it renders its decision, unless to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

There would be no injustice in applying the 1978 amendments to the instant case. New Jersey and Pennsylvania (like all other participating states) were very much aware (especially in light of the 1970 and 1974 statutory amendments) that the Department historically

was auditing programs and administratively demanding repayment of funds determined to have been misspent. Since the duty to repay misspent funds inheres in the terms on which the grant was made, the 1978 amendments made procedural, not substantive changes.

IV.

Strong policy justifications exist for requiring repayment of the funds at issue in this case. Unless the Department can impose a penalty for misexpenditures, states and local districts may ignore statutory restrictions which are critical to assuring that categorical funds reach their intended beneficiaries. This is particularly the case in a time of fiscal constraint when local school administrators will be pressured to use federal grants to fill revenue gaps.

The Third Circuit's decision was obviously influenced by a fear that educationally deprived children living in poor areas of Pennsylvania and New Jersey will suffer if repayment is ordered in this case. However, repayment would be the least onerous form of penalty available to the Department in this case. The 1978 amendments to the law permit the Secretary to return up to 75% of funds repaid by state or local education agencies to the states, to be used to provide additional compensatory services to educationally deprived children. Withholding of future grants, on the other hand, would reduce the level of funds otherwise available for remedial programs. Thus administrative repayment vindicates the rights of the statute's intended beneficiaries.

ARGUMENT

I. THE DUTY TO MAKE RESTITUTION FOR MISUSED FUNDS INHERES IN THE TERMS UNDER WHICH THE FUNDS WERE GRANTED TO THE STATES

It is undisputed that Title I funds are granted by the federal government to state agencies only for programs which contribute to meeting the needs of educationally deprived children in areas where there are large concentrations of children from low-income families.[4] From its inception, the statute was constructed to make certain that the funds were used only for the intended purposes. Schools, attendance areas and children had to meet very specific statutory criteria to obtain Title I funds and states had to submit assurances that the funds would be administered in accordance with all applicable statutes and regulations.[5] Thus states receiving funds under Title I took them for specific purposes and for no other. When, therefore, the states used such funds for their own, unauthorized purposes, they breached the condition under which the funds were granted. Their position is like that of a trustee who has received money for one purpose and wrongfully converts it to his own use. It is inherent in the condition of trusteeship that funds so converted would be subject to repayment. So here, it is inherent in the restricted terms on which the grant of funds was made that funds converted to unauthorized uses must be repaid.

The states argue, and the court below, without specifically deciding the issue, seems to have accepted, the proposition that, under the "overarching principle" of *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), the states had no obligation to repay misused funds because

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[4] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29.

[5] Pub. L. No. 89-10, § 206, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29, 34.

the duty to repay was not specifically spelled out in the statute until the 1978 amendments. They suggest that the inclusion in the statute of other remedies for misuse, such as the right to withhold future grants,[6] indicates that no other remedy for misuse was intended. Such remedies are not, however, inherent in the conditions of the grant, as is the basic principle that funds converted from their intended purpose must be repaid. The fact that Congress did not find it necessary to spell out this fundamental principle of law cannot be taken as evidencing an intent to render it inapplicable. If a contract of employment specified theft as a reason justifying discharge, this would not give the employee the right to keep the money he had stolen. So here, the fact that Congress specified that future grants could be withheld does not indicate an intent to immunize the states from the basic duty to repay funds which were received for one purpose and diverted to the states' own uses.

This Court's opinion in *Pennhurst State School v. Halderman*, *supra*, does not compel a different conclusion. *Pennhurst* involved a statute which failed adequately to inform states participating in the program which it created of the operating conditions attached to receipt of a grant; the instant matter concerns the sanctions which attend violation of statutory conditions which have at all times been known to participating states.

The fact that Congress in 1978 specially spelled out the duty to repay misused funds does not mean that such duty did not previously exist. As we develop in more detail below, the 1978 amendments were enacted in response to a well-documented decline in audit and recovery activity on the part of the Office of Education. They were designed to establish mandatory standards for the audit process. In such a comprehensive detailing of the procedure for audit and review, it was natural to spell

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[6] Pub. L. No. 89-10, § 210, 79 Stat. 27, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 29, 36.

out the obligation to pay as well as the procedure for enforcing payment. Caution and redundancy on the part of lawyers and legislators are not uncommon. Reaffirmation of the duty to repay misused funds cannot, therefore, be taken as a sign that Congress previously intended to abrogate the fundamental duty to repay misused funds. To the contrary, as the legislation discussed in Point II of this brief makes clear, Congress always recognized that misspent funds were subject to recovery by the federal government. Indeed, in 1974, Congress enacted a five-year statute of limitations on the right of the federal government to recover misspent funds from the states.[7] (See *infra*, p. 13) It is thus evident that Congress never deemed it necessary to spell out the basic concept that misspent funds should be repaid. That it did so in 1978 in the course of an attempt to strengthen the administrative efforts at enforcement neither adds to nor changes the fundamental duty which already existed. States which obtained money for a specific, limited, purpose are properly held to the knowledge that they must repay funds converted from that purpose to their own use.

II. SINCE ITS INCEPTION, THE ELEMENTARY AND SECONDARY EDUCATION ACT HAS GIVEN THE FEDERAL GOVERNMENT THE POWER TO CONDUCT AUDITS AND DEMAND REPAYMENT OF FUNDS DETERMINED TO HAVE BEEN MISSPENT

Since the duty of the states to repay misused funds is clear, the only issue in this case is how that duty may be enforced. We agree with the government that, even without statutory authority, the government would have the right to enforce payment by appropriate and reasonable means, including deducting or withholding the amount due from other sums otherwise payable to the recipient.

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[7] Pub. L. No. 93-380 (Education Amendments of 1974), § 106, 88 Stat. 484, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 541, 576.

We rely on the government's argument on that point. Here we deal only with the proposition that from the enactment of the statute, Congress authorized and affirmed the use of administrative methods to determine the extent of misused funds and to enforce repayment thereof.

Since the Title I program began, the Department of Education (or its predecessor agencies) have audited state and local projects and demanded repayment of funds determined to have been misspent. Congress has always been aware of these activities and has enacted legislation to facilitate the audit-collection process.

Section 424 of the General Education Provisions Act,[8] Pub. L. No. 91-230,[9] enacted in 1970, prescribed specific procedures for keeping and retaining records to determine expenditures. It also authorized access by the Secretary and Comptroller General or their duly authorized representative to make "effective audit."[10] The author-

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[8] The General Education Provisions Act (GEPA), 20 U.S.C.S. § 1221 *et seq.*, contains general provisions regarding planning, evaluation, operation and administration of federal education programs. Its provisions are part of ESEA and applicable to Title I.

[9] (Education Amendments of 1970) 84 Stat. 121, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 133, 191.

[10] The statute provides:

Records and Audit

Sec. 424. (a) Each recipient of funds from a grant or contract under any applicable program shall keep such records as the Commissioner shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant or contract is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources and such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any

ity of the administrative agency to determine whether there had been misuse of restricted funds was thus clearly established. Congress could not, as the court below suggested, have intended the audit procedure to be merely a way of getting information. If misapplication were found, the agency would be duty bound to take action to remedy the situation. Demand for repayment of misexpenditures is the obvious choice.

That Congress expected the agency to take action to recover misapplied funds uncovered as a result of an audit is confirmed by legislative history accompanying this provision.

S. Rep. No. 91-634, 92d Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 2768, 2827 states:

> Audit reports on Title I of the Elementary and Secondary Education Act have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to be well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer.

This shows that, contrary to the opinion below, Congress did not enact the audit provisions merely to obtain information. It knew that the agency was determining misapplication of funds and enforcing repayment and expected the agency to continue to do so.

Subsequent developments make this even clearer. In 1972, at the suggestion of the grantees, the Secretary, under his rulemaking power, established the Title I Audit

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books, documents, papers, and records of the recipients that are pertinent to the grant or contract received under any applicable program.

Hearing Board (AHB) to review determinations of misapplication found as the result of audits (37 Fed. Reg. 23002-03). In 1974 Congress enacted amendments to ESEA, which contained a five-year statute of limitations on liability for the refund of misspent Title I funds. Pub. L. No. 93-380 (Education Amendments of 1974), § 106, 88 Stat. 484, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 541, 576, provides:

> *Statute of Limitations on Refund of Payments*
>
> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (*including Title I of this Act*) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized. (emphasis added)

The period of limitations was made to run back from the time the state or local agency received "final written notice" that such payment was unauthorized. In explaining what was meant by "final written notice" the House Report reviewed the various steps then existing in the administrative process and stated:

> The Committee intends "final written notice" to be that notice which is given after the State or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on that audit exception.

H.R. Rep. No. 93-805, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4093, 4160.

Congress thus sanctioned the use of administrative proceedings to enforce the duty to repay misspent funds.

In 1978 Congress enacted Section 185,[11] (Pub. L. No. 95-561, 92 Stat. 2143, 2190 (codified as amended at 20

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[11] *Audits and Audit Resolution*

Sec. 185. (a) *Auditing.*—The Inspector General of the Department of Health, Education, and Welfare shall make provision

U.S.C.S. § 2835 (Supp. 1982)) of Title I which directs the Inspector General to conduct audits, and directs the Commissioner to adopt procedures to assure "timely and appropriate" resolution of audit findings. That statute provides that where "under such procedures" the audit resolution requires repayment of misspent funds, the Commissioner "shall require the repayment." It then specifies how repayment may be made.

At the same time it enacted Section 185, Congress amended the General Education Provisions Act (GEPA) to clarify the procedures for audit, including the provision invoked by the states here for judicial review of a final decision by the Court of Appeals.[12]

The Third Circuit held that enactment of Section 185 and other audit provisions in GEPA would not have been necessary if Congress had meant to give this power to the Office of Education (OE) before 1978; that if the

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for audits of grants made under this title to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant.

(b) *Audit Resolution and Repayment.* The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a). Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Commissioner shall require the repayment of the amount of funds under this title which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

[12] 20 U.S.C.S. § 1234d (Supp. 1982).

power to make and enforce administrative determinations previously existed, Congress was, in the 1978 statute, performing a redundant act. It is, however, evident from the face of Section 185 itself that Congress was not creating new rights or even basically new procedures. It was merely directing the strengthening of existing procedures and regulating an already existing administrative process. For example, the power to conduct audits had, as noted above, been given to the Secretary in 1970. Section 185 did not confer new powers; it merely directed that audits be conducted by the Inspector General. Similarly, subsection (b) of Section 185 assumes the existence of an administrative process; it merely directs a speeding up of that process by requiring timetables and by specifying methods of repayment. Particularly when read with the amendments of GEPA relating to the administrative process, Section 185 is properly understood as clarifying an old process, not establishing a new one.

The legislative history of § 185 and the enforcement provisions of GEPA show that Congress enacted these amendments to correct what it regarded as inadequate enforcement by the Office of Education.

H.R. Rep. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4971, 5023-24 states in part:

> The Committee is disturbed by the aforementioned NIE findings concerning the decline in the level of HEW audit activity focused on Title I. The Committee wishes to emphasize that the Inspector General of HEW should insure that Title I programs are audited on a regular basis. . . .
>
> The Committee has in the past expressed its dissatisfaction with the Title I audit resolution process. Adequate improvement has not been forthcoming. The Committee directs the Commissioner to promulgate regulations describing each step of the audit resolution process and deadlines for its completion.

> The Committee expects that such regulation will reflect the relationships among the various OE responsible offices and the Office of the Inspector General. The Committee notes that the HEW Sanction Study states that ". . . as of this writing it may be said that coordination among the various responsible OE offices (BESE, Audit Liaison and Coordination Office, Audit Hearing Board, and Finance Division) is poor. Their roles are not clearly defined and written procedures have yet to be finalized."

The National Institute of Education (NIE) reports referred to by the Committee [13] contained a detailed analysis of the monitoring and enforcement of Title I and concluded that, for various reasons, there had been a marked decline in the monitoring of the use of Title I funds. The Committee, finding the quality of the research by NIE to be excellent, relied on these reports in formulating amendments to Title I. H.R. Rep. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4971, 4975. *See also*, 124 Cong. Rec. 27,317 (1978) (statement of Sen. Pell). The Committee also relied on recommendations for clarifying and simplifying the statute prepared by The Legal Standards Project of the Lawyers' Committee for Civil Rights Under Law, many of which were incorporated into S. 1753 and H.R. 15. (The House bill was passed in lieu of the Senate bill.) [14] All this material indicates that Congress and

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[13] *See* National Institute of Education, ADMINISTRATION OF COMPENSATORY EDUCATION (1977). The NIE prepared six reports pursuant to the Education Amendments of 1974, Pub. Law 93-380. NIE had been directed by Congress to conduct a comprehensive three-year study of Title I.

[14] A comparison of the language in the Lawyers' Committees' recommendations on § 185 and its accompanying legislative history (*see* R. Silverstein, A DESCRIPTION AND ANALYSIS OF H.R. 10891—A BILL REORGANIZING AND AMENDING TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT, 354-57 (1978)) and the language included in Pub. L. 95-561 and H. Rep. No. 95-1137 reveals that the Lawyers' Committees' recommendations on this section were adopted almost verbatim by the Committee.

its consultants did not think of their efforts as creating new rights or new procedures but as clarifying and correcting an existing process.

III. EVEN IF THE DEPARTMENT OF EDUCATION HAS NOT ALWAYS HAD AUTHORITY TO DEMAND REPAYMENT, ITS PRESENT STATUTORY AUTHORITY TO DO SO SHOULD BE APPLIED TO THE AUDITS IN THE INSTANT CASE

As discussed in Point I of this brief, there can, in our view, be no serious doubt of the basic obligation of states to repay funds which were given to them for a specific purpose but converted by them for their own unauthorized uses. The review of the audits here involved were conducted by the Educational Appeal Board, created by the 1978 amendments as successor to the prior administratively created Board.[15] Review of the audits were initiated by the states in the Court of Appeals pursuant to the 1978 amendments (20 U.S.C.S. § 1234d(Supp. 1982)). Under these circumstances the 1978 statutory amendments should be applied to the audits in the instant case. The 1978 amendments did not create any new obligation on the part of states; at most the 1978 amendments defined an administrative method (with right of judicial review) for enforcing an existing obligation. The change, if it was a change, was procedural, not substantive.

It is an established rule of statutory construction that changes in procedure or remedies, which do not take away substantive rights, are applicable to cases pending at the time of enactment. *See Hallowell v. Commons*, 239 U.S. 506, 508 (1916).[16] Similarly, the general rule is

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[15] 20 U.S.C.S. § 1234 (Supp. 1982).

[16] *See also United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); *Bush v. State Industries, Inc.*, 599 F.2d 780, 786 n.9 (6th Cir. 1979); *United States v. Blue Sea Line*, 553 F.2d 445, 448 (5th Cir. 1977); *Koger v. Ball*, 497 F.2d 702, 706 (4th Cir. 1974); and *see generally Sikora v. American Can Co.*, 622 F.2d 1116, 1119 (3rd

that a court must apply the law in effect at the time it renders its decision, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981); *Cort v. Ash*, 422 U.S. 66, 77 (1975); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). This rule applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization. *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 282 (1969). Neither rule will, however, be applied when to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Cort v. Ash*, 422 U.S. at 77; *Bradley v. School Bd. of Richmond*, 416 U.S. 711; *United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); *Koger v. Ball*, 497 F.2d 702, 706 (4th Cir. 1974).

It would not be manifestly unjust to apply the 1978 amendments regarding audits to pre-1978 audits. Not only did the obligation to repay misspent funds exist from the time the funds were converted from their intended use, but even the procedures for collection were in general well known to the states before 1978. Audits and recoupment of misspent funds had been taking place since the program began. In 1970 when the statute was amended to include recordkeeping requirements which would facilitate effective audits, the states must have expected some consequences if an audit revealed misapplication of funds. The 1974 statute of limitations, which ran the period back from the final administrative decision, put the states on notice that administrative methods of enforcement were in progress.

As discussed above, the 1978 amendments on their face reveal an intent, reinforced by the legislative history, to

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Cir. 1980); *Mahroom v. Hook*, 563 F.2d 1369, 1373 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); *United States v. Mechem*, 509 F.2d 1193 (10th Cir. 1975); *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974); *Brown v. General Services Admin.*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976); *Montana Power Co. v. Federal Power Comm'n*, 445 F.2d 739, 747 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971).

clarify and strengthen existing procedures. The legislative history of § 451 of GEPA,[17] creating the Education Appeal Board (EAB) indicates that Congress fully expected the new Board to build upon the existing Title I Audit Hearing Board. H. Rep. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4971, 5111. Thus, it is apparent that Congress did not intend the 1978 amendments to have only prospective effect. Rather, the 1978 amendments, including Section 185, were procedural changes, properly applied to pending cases. Indeed the states themselves so recognized when they sought review of the audits in the Court of Appeals pursuant to section 455;[18] hence the procedures of the 1978 amendments, including Section 185, are properly applied here.

IV. THERE ARE STRONG POLICY REASONS FOR REQUIRING REPAYMENT IN THE INSTANT CASE

The Third Circuit's decision was obviously influenced by its fear that requiring repayment in the instant case would cause educationally deprived children living in poor areas to suffer. In light of the 1978 amendments to GEPA, however (which, as we have shown, are properly applied here), there is no basis for this fear.

Requiring repayment of misspent or misapplied Title I funds is not a penalty, but rather restitution of funds which were improperly used. If restitution is not made, the educationally deprived children who failed to receive the benefits of the misspent funds are the parties who are penalized. Any hardship on States and/or local education agencies (LEAs) can be mitigated, and the equitable rights of educationally deprived children to the benefits of these funds substantially preserved, by use of the 75% payback provision added to ESEA in the 1978 edu-

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[17] 20 U.S.C.S. § 1234 (Supp. 1982).

[18] 20 U.S.C.S. § 1234d (Supp. 1982).

cation amendments (§ 456, 20 U.S.C.S. § 1234e (Supp. 1982)).[19] Pursuant to this section up to 75% of mis-

[19] This section states:

Use of recovered funds

(a) Whenever the Commissioner has recovered funds following a final audit determination with respect to any applicable program, he may consider those funds to be additional funds available for that program and may arrange to repay to the State or the local agency affected by that action not to exceed 75 percent of those funds upon his determination that—

(1) the practices or procedures of the State or local agency that resulted in the audit determination have been corrected, and that the State or the local agency is in all other respects in compliance with the requirement of that program;

(2) the State or the local agency has submitted to the Commissioner a plan for the use of those funds pursuant to the requirements of that program and, to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and

(3) the use of those funds in accordance with that plan would serve to achieve the purposes of the program under which the funds were originally granted.

(b) Any payments by the Commissioner under this section, shall be subject to such other conditions as the Commissioner deems necessary to accomplish the purposes of the affected programs, including—

(1) the submission of periodic reports on the use of funds provided under this section, and

(2) consultation by the State or local agency with parents or representatives of the population that will benefit from the payments.

(c) Notwithstanding any other provisions of law, the Commissioner may authorize amounts made available under this section to remain available for expenditures, subject to such conditions as he deems appropriate, for up to three fiscal years following the fiscal year in which the audit determination referred to in subsection (a) was made.

(d) At least thirty days prior to entering into an arrangement under this section, the Commissioner shall publish in the Fed-

applied funds may be returned to the state or LEA for approved Title I programs.

Recovered funds must come from non-federal (or unrestricted federal) grants, *see* § 185 (20 U.S.C.S. § 2835), and thus would augment funds otherwise available for Title I purposes. A withholding action, which the states urge as a penalty, would deny Title I children the misapplied funds not only when they are spent but also any or all future payments, rather than just the misspent portion, thereby penalizing them twice. Use of the repayment sanction, on the other hand, would assure that the intended beneficiaries of the Title I program, originally harmed by the misexpenditure, would now benefit by obtaining a large portion of the original misspent amount.

Even without these special considerations, repayment for misspent funds is proper. There must be some penalty for misusing Title I funds to insure that States and localities do not ignore statutory proscriptions. Unless there is an effective penalty for misuse of funds granted for a particular purpose, the temptation to misuse such funds will not be restricted, particularly in times of economic stringency.

Other remedies for noncompliance, such as withholdings,[20] compliance agreements,[21] and cease and desist orders,[22] are effective only if noncompliance is discovered when it first occurs. In a program as large as Title I, under which 14,000 school districts receive funds annu-

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eral Register a notice of his intent to do so and the terms and conditions under which payments will be made. Interested persons shall have an opportunity for at least thirty days to submit comments to the Commissioner regarding the proposed arrangement.

[20] 20 U.S.C.S. § 1234d (Supp. 1982); 20 U.S.C.S. § 2836 (Supp. 1982).

[21] 20 U.S.C.S. § 2836(c) (Supp. 1982).

[22] 20 U.S.C.S. § 1234c (Supp. 1982).

ally, it is impossible to discover all violations at the time they occur. Enforcement through post-expenditure audit findings is therefore essential.

To excuse pre-1978 violations would allow New Jersey, Pennsylvania, and other states with cases still on appeal to avoid the requirements of the law.[23] Such a result would encourage state and local districts to take program requirements less seriously. It would be unfair to states which have not violated program restrictions and states which, having been found in violation, have voluntarily recognized their accountability and paid their debts. The interests of Title I children and the taxpayer will suffer if States are allowed with impunity to spend funds outside of the purview of the program. These interests will be doubly impaired: first, because funds were diverted from those the program was intended to help, and again when these funds are not recovered. The rights of the program beneficiaries can be vindicated by repayment of the misspent funds. With the 75% payback provision, most of this money can then be directed to those for which it was originally intended—educationally deprived children.

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[23] If the Third Circuit's opinion is affirmed, it is very likely that other federal agencies will be challenged, in their efforts to recoup misspent funds, if there is no explicit statutory authority to demand repayment.

CONCLUSION

The judgment below should be reversed and the case remanded to the Court of Appeals for determination of the issues remaining in the case.

Respectfully submitted,

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No. 81-2125

In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER,

v.

STATE OF NEW JERSEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE STATES OF MARYLAND, DELAWARE, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MISSISSIPPI, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, TEXAS, VERMONT, VIRGINIA, WEST VIRGINIA, AND THE CALIFORNIA DEPARTMENT OF EDUCATION, THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF RESPONDENTS

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The Amici Curiae, by their respective legal counsel, submit this brief in support of the positions taken by Respondents New Jersey and Pennsylvania and urge the Court to affirm the judgment of the United States Court of Appeals for the Third Circuit in *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981).[1]

[1] Letters of consent by all parties to the submission of this brief are being filed with the Clerk pursuant to Rule 36 of the Rules of this Court.

INTEREST OF AMICI CURIAE

Each of the Amici Curiae is acutely interested in the Court's disposition of this case.

Like Respondents New Jersey and Pennsylvania, all of the States joining in this brief have participated as grantees in the funding program provided by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 *et seq.* (Supp. 1982) ("Title I"). Of these States, California, Hawaii, Illinois, Kentucky, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, Texas, Virginia, and West Virginia have been ordered by the Secretary of Education (the "Secretary") to repay Title I funds received and allegedly misspent before 1978.

None of these States has been charged with fraud or with diverting Title I funds to a use other than the education of its children. Their disputes with the Secretary arise from alleged mistakes made in implementing a new and complex federal program under an intricate set of rules and regulations, the terms of which were open to various interpretations.

Maryland's situation illustrates the manner in which the Secretary has attempted to exercise the power he seeks in this case against Title I grantees. The Secretary has ordered Maryland to refund $10,875,333 in Title I funds allegedly misspent during fiscal years 1975 through and including 1978. The focus of Maryland's dispute with the Secretary is the meaning of the terms "comparability" and "supplant" in the Title I regulations. *See* 34 C.F.R. Part 200. Maryland's appeal of the Secretary's order is currently pending before the Education Appeal Board of the Department of Education.

The National Association of State Boards of Education represents the State boards of education in 46 States and

five United States Territories in the boards' effort to promote quality education and strengthen the lay control of American public education.

The American Council on Education is a voluntary membership organization composed of 1,355 non-profit institutions of higher education from both the public and private sectors and 178 educational associations.

SUMMARY OF ARGUMENT

The judgment of the Third Circuit below should be affirmed because it is a correct application of the rule and reasoning of *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) and other controlling legal principles. The Secretary has neither specific statutory authority nor a common law right to recoup through administrative proceedings Title I funds received and spent before October 1, 1978. The only statutory provision giving such authority was added to Title I by amendments effective on October 1, 1978, which, under *Pennhurst*, cannot be applied retroactively to funds received and spent prior to that effective date. The Secretary has no common law right, independent of statutory authority, administratively to recoup misspent Title I funds because Congress abrogated that right by establishing a comprehensive remedial scheme as part of Title I and because even if such a right existed it could only be exercised through an action in a court of competent jurisdiction.

Unless the Third Circuit's decision is affirmed, the States that accepted Title I funds before October 1, 1978 will be subject to a penalty that was not a part of the terms of the grant under which they agreed to participate in Title I. They may be forced to repay Title I funds out of their general treasuries, requiring them to increase taxes, incur additional debt, or eliminate services to their citizens to compensate for the loss of those funds. By

displacing a State's decisions about those matters, such a penalty would conflict with the principle of Federalism under which States must be free to function effectively and independently as coordinate elements in the Federal System. This is especially true in the field of public education, which has a long tradition in this country of being committed to the control of State and local authorities.

ARGUMENT

THE THIRD CIRCUIT'S DECISION SHOULD BE AFFIRMED BECAUSE IT IS A CORRECT APPLICATION OF *PENNHURST STATE SCHOOL v. HALDERMAN* AND OTHER CONTROLLING LEGAL PRINCIPLES.

In its decision below, *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981), the Third Circuit correctly held that the Secretary lacked both statutory authority and a common law right administratively to recoup Title I funds allegedly misspent before 1978. Title I funds are available only to schools, attendance areas and children meeting very specific criteria set forth in the Title I regulations. The *Hufstedler* case arose when, after audits and subsequent administrative review, the Secretary determined that New Jersey and Pennsylvania had failed to meet those criteria with respect to certain Title I funds received and spent before 1978 and ordered those States to refund the misspent funds.

The Third Circuit ruled that the Secretary lacked specific statutory authority to order the refund because the only provision giving such authority, Section 185 of Title I, 20 U.S.C. § 2835 (Supp. 1982), was added to Title I by amendments that became effective on October 1, 1978. Relying on *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), the Court concluded that those amendments could not be applied retroactively to funds received and spent prior to their effective date. 662 F.2d at 212-16. The

Court also held that the Secretary had no common law right independent of specific statutory authority to recoup the funds through administrative proceedings because such a right may only be exercised, assuming that it exists at all, through an action in a court of competent jurisdiction. *Id.* at 216-18.

Almost contemporaneously with the Third Circuit's decision in *Hufstedler,* the United States Court of Appeals for the Fourth Circuit, ignoring *Pennhurst,* ruled in a per curiam opinion, which the Court initially ordered not to be published,[2] that the Secretary had both statutory and common law authority to order, after administrative proceedings, West Virginia to refund Title I funds misspent before 1978. *West Virginia v. Secretary of Education,* 667 F.2d 417 (4th Cir. 1981).

It is essential to understand what this case is and is not about. The decisions of the Third and Fourth Circuits present this Court with the issue whether, in the absence of fraud, the Secretary has the authority in the administration of new and complex regulations to recoup Title I funds received and allegedly misspent before October 1, 1978 through administrative proceedings initiated years after the promulgation of the regulations and the expenditure of the funds.

This case does not concern Title I funds received and misspent after October 1, 1978 because Congress has specifically given the Secretary the power to recoup those funds through administrative proceedings.

However, the need for a clear ruling from this Court on the extent of the Secretary's power under the pre-1978

[2] *See West Virginia v. Secretary of Education,* No. 80-1704 (4th Cir. Oct. 15, 1981) (unpublished slip opinion). On December 23, 1981, the Court granted the Secretary's motion to publish the opinion, thus giving it precedential authority. *See* 4th Cir. R. 18.

version of Title I was underscored by Congress' enactment of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 463 (1981), in which Congress returned to that approach by limiting the Secretary to remedies other than recoupment. *See* 20 U.S.C. §§ 3803, 3872 (Supp. 1982).

The myriad of other federal grant statutes discussed and alluded to in the Secretary's brief (Sec. Br. 2-5) should not affect the disposition of this case. Each of those statutes contains its own enforcement scheme established by Congress so as best to comport with the purpose and nature of the grant program involved.

It is also important to appreciate the power the Secretary is asking this Court to grant him. Although his brief contains references to his authority to "offset" (Sec. Br. 8, 13, 19, 20, 26), "recoup" (*id.* 13, 19, 20), and "withhold" (*id.* 14, 32) Title I funds, the Secretary is asserting nothing less than the power to order States to repay Title I funds out of their general treasuries without first having to file suit in court (*See* Sec. Pet. 17; Sec. Br. 20).

The exercise of that power would have the gravest impact on a State's sovereignty. Forcing a State to increase taxes, incur additional debt, or eliminate services to its citizens to satisfy such a refund order would displace a State's decisions about those matters and thereby impair its ability to function effectively and independently as a "coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities v. Usery*, 426 U.S. 833, 849 (1976). This is especially true in the field of public education, which has a long tradition in this Nation of being "committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This is not to say that Congress cannot give the Secretary such power. However, because of the broad and

intrusive nature of that power this Court should not find that Congress intended to grant it without the clearest expression of Congressional intention to do so. *See Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981). The post-1978 version of Title I contains such an expression in Section 185. The pre-1978 version of Title I contains absolutely no evidence of such an intention.

The exercise of the power the Secretary seeks in this case would also harm the intended beneficiaries of Title I — economically disadvantaged schoolchildren. If he were to exercise that power by forcing a State to repay funds it can be expected that, given the limited resources available to a State and the numerous demands made on those resources, the ultimate source for the funds would be State or federal funds for which there is no accountability to the federal government that would otherwise be directed to educational programs for poor schoolchildren. If the Secretary were to exercise that power by offsetting the amount owed against current Title I funds he would be penalizing the disadvantaged schoolchildren of *today* for the mistakes made by school administrators *over five years ago.*

The federal government's role in the disputes that generated this case must also be noted. The federal government was the lead partner in Title I and shares in any culpability for errors in its implementation. It wrote the Title I regulations and its agents were charged with the responsibility to conduct audits to assure that the States were spending their Title I funds in compliance with those regulations. Had the federal government discovered the alleged errors at the time they were being made, the States could have taken corrective action *at that time* without suffering any, or at the worst any significant, disruption of their efforts to carry out the goals of Title I.

I.

THE SECRETARY HAS NO STATUTORY AUTHORITY TO ORDER STATES TO REFUND TITLE I FUNDS RECEIVED AND SPENT BEFORE OCTOBER 1, 1978.

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) is crucial to a proper analysis of the Secretary's authority. This Court held in *Pennhurst* that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-81 (1976 & Supp. III 1979), which establishes a voluntary grant program under which participating States receive federal funds to assist in caring for mentally retarded persons, did not impose an affirmative obligation on the States to provide persons under care with "appropriate treatment" in the "least restrictive" environment. 451 U.S. at 18-19. The Court reasoned that the section of the Act that supposedly created such an obligation did not unambiguously state that compliance with its terms was a condition of receiving federal funds. *Id.* at 18-27.

The principle on which the Court's decision rested is that the States may not be forced to comply with conditions to grant programs enacted under Congress' spending power[3] unless those conditions are clearly and unambiguously set forth in the statute authorizing the grant when the States decide to participate in the grant program by accepting funds. The Court explained that

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly

[3] Counsel for the Secretary conceded at the oral argument before the Third Circuit that Title I was, like the statute at issue in *Pennhurst*, enacted under the spending power. *See* 662 F.2d at 214 n.15.

> accepts the terms of the "contract." See *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598 (1937); *Harris v. McRae*, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Cf. *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17 (footnote omitted).

As the Third Circuit correctly held, the principle stated in *Pennhurst* impels the conclusion that the Secretary lacks specific statutory authority to order the repayment of Title I funds received and spent before October 1, 1978. The only express authorization to recoup was provided in amendments to Title I that became effective on that date, amendments that, under *Pennhurst*, cannot be applied retroactively to funds received and spent before their effective date.

Section 185 of Title I, 20 U.S.C. § 2835 (Supp. 1982), added by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143, 2190-91 (1978), grants the Secretary statutory authority to order a refund of misspent Title I funds. That Section provides that when Title I audits disclose a misapplication of grant funds, the Secretary shall take steps to "assure timely and appropriate resolution of audit findings and recommendations," including a repayment of funds "finally determined . . . to have been misspent or misapplied." By the terms of the 1978 amendments, Section 185 was to "take effect October 1, 1978." 92 Stat. at 2380.

Section 185 substantially changed Title I's enforcement scheme. Before Section 185 was enacted, the Secretary had no statutory authority to order refunds of misspent Title I funds. Instead, he could enforce the proper expenditure of Title I funds only through the withholding of future Title I funds or the disapproval of applications for Title I funds. *See* 20 U.S.C. §§ 241f, 241j (1974) (current version at 20 U.S.C. §§ 2832, 2836 [Supp. 1982]). Each of these remedies would affect only the State's receipt of future Title I funds; neither gave the Secretary the power to require repayment of misspent funds.

The evolution of Title I's enforcement scheme reflects Congress' recognition of the principle so eloquently described by Justice Black, writing for the Court in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), as "Our Federalism." Under that principle the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests, [must] always endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* The remedies that were part of Title I as it was initially enacted caused little or no interference with a State's governmental activities.

The pre-1978 remedies represented a reasonable balance between State and federal interests in providing Title I educational services. If a State was found by audit to have used Title I funds for purposes other than those specifically intended by Congress, the Secretary could withhold or disapprove future Title I funds for the State until he was fully satisfied that they would be spent for the specific purposes for which Congress intended them. In this manner, the ultimate purpose of Congress to provide supplemental educational services to disadvantaged schoolchildren would be achieved without intruding into the State's sovereignty and without depriving the State of supplemental funds for disadvantaged schoolchildren where proper expenditure was assured.

In 1978, however, Congress, believing that a stronger remedy was necessary, gave the Secretary the power to force States to repay misspent Title I funds out of their general treasuries by adding Section 185, a far broader and more intrusive power than that previously given him. Under *Pennhurst,* this new remedy may only be exercised against States that voluntarily and knowingly assumed the risk of its imposition on them by accepting Title I funds after October 1, 1978.

As the Secretary recognized (Sec. Br. 13, 17), the relationship between the federal government and States participating as Title I grantees is "much in the nature of a contract." *Pennhurst State School v. Halderman,* 451 U.S. 1, 17 (1981). The terms of the contract were materially altered by the 1978 amendments. Before October 1, 1978, when Section 185 became effective, that contract provided that the States would receive Title I funds so long as those funds were spent in compliance with Title I's requirements; if the funds were misspent, the States would not receive any further Title I funds until compliance was assured. The contract created by the 1978 amendments to Title I provides that if Title I funds are misspent, the States must repay those funds *out of their general treasuries. See* 662 F.2d at 214.

Under the pre-1978 contract, a State's decision to participate in Title I and accept funds was based only on the risk that if it misspent those funds, the Secretary would turn off the Title I tap and the State would have to carry on, as before, with the education of its children without the aid of Title I funds or until it had provided adequate assurance that irregularities had been corrected and further Title I funds would be properly expended strictly in compliance with the statutory requirements. Under the post-1978 contract, the risk of accepting Title I funds is quite different. If a State accepts and misspends

those funds it may be forced to repay them out of its general treasury, requiring the State to increase taxes, incur additional debt, or eliminate services to its citizens to compensate for the loss of those funds.

Thus, the Secretary's assertion that the 1978 amendments to Title I did not "impose new substantive obligations on" the States (Sec. Br. 39) is simply untrue.

As the Third Circuit correctly concluded, a State that entered the pre-1978 Title I contract with the federal government and received and spent Title I funds pursuant to that contract cannot, under *Pennhurst,* be forced to bear the additional burden imposed by the post-1978 contract created by Section 185. *See* 662 F.2d at 214. Paraphrasing *Pennhurst,* 451 U.S. at 17, States can only be held to the terms of the Title I contract that they "voluntarily and knowingly" accepted when they entered that contract; they would be unable to "exercise their choice [whether to participate in Title I] knowingly, cognizant of the consequences of their participation," if they were to be forced to accept conditions and penalties added years after that choice was made.

A fundamental principle of statutory construction supports the Third Circuit's conclusion that Section 185 should not be applied retroactively. In *Greene v. United States,* 376 U.S. 149, 160 (1964), this Court explained that principle:

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . *unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."*

(quoting *Union Pacific Railroad v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913)) (emphasis supplied). *See*

also Brewster v. Gage, 280 U.S. 327, 337 (1930) ("Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears."); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."); *see generally* 2 Sutherland, *Statutory Construction*, § 41.04, at 252-54 (C. Sands ed. 1973).

The rule stated in these cases proscribes the retroactive application of Section 185 in the absence of any explicit and unequivocal evidence that Congress intended it so to apply.

There is absolutely nothing in Section 185 or its legislative history indicating that Congress intended it to apply retroactively to Title I funds received and spent before its effective date. *See* 1978 U.S. Code Cong. & Ad. News 4971-5226. Section 185 was added to Title I by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143-2380 (1978). Section 1530 of the Amendments provides that Section 185 "shall take effect October 1, 1978." *Id.* at 2380.

The Secretary argues that reliance on Section 185 does not involve an unfair retroactive application of the law, citing the principle that federal courts and administrative agencies must apply the law in existence at the time of decision, including any change that became effective during the course of the proceedings. However, that principle only applies when the statutory change at issue is *procedural* in nature and does not affect a *substantive* right of a party. In *Hallowell v. Commons*, 239 U.S. 506, 508 (1916), for example, this Court held applicable to a suit pending in federal court to determine Indian heirship a statute vesting the Secretary of the Interior with

jurisdiction of such controversies because the statute enacted after the suit was begun "takes away no substantive right, but simply changes the tribunal that is to hear the case." *See also Bowles v. Strickland,* 151 F.2d 419, 420 (5th Cir. 1945) (amendment to the Emergency Price Control Act eliminating the requirement that the Secretary of Agriculture approve the filing of lawsuits applied to pending litigation because the "amendment did not affect substantive rights, but related only to the procedural machinery provided to enforce such rights. . . ."); *United States v. Vanella,* 619 F.2d 384, 385-86 (5th Cir. 1980) (1979 amendment to the Speedy Trial Act suspending imposition of the dismissal penalty applied to pending case because it was only a "procedural" change in the statute).

As discussed above, the addition of Section 185 to Title I made a substantive, rather than a procedural, revision to Title I. It substantially altered Title I's enforcement scheme by adding a new penalty for noncompliance — refunding of misspent funds out of a State's general treasury — and thus materially changed the risk undertaken by States that decided to participate in Title I.

Moreover, even if the change made to Title I by Section 185 is characterized as procedural, the retroactive application of that Section is proscribed by *Bradley v. Richmond School Board,* 416 U.S. 696, 711-21 (1974), in which this Court set forth those circumstances under which a statute may be retroactively applied, because it would result in a "manifest injustice". A retroactive application of Section 185 would unfairly impose on the States that accepted Title I funds before 1978 an "increased burden" in the form of a penalty that was not a part of the contract under which they agreed to participate in Title I, a "new and unanticipated obligation [ ]," *id.* at 720-21. Retroactive application of that penalty would also unjustly harm the intended beneficiaries of Title I — disadvantaged school-

children — because States may be less likely to participate in Title I in the future if they cannot know for certain the risks they undertake and the penalties to which they subject themselves when they decide to accept Title I funds.

II.

THE SECRETARY HAS NO COMMON LAW RIGHT TO RECOUP MISSPENT TITLE I FUNDS THROUGH ADMINISTRATIVE PROCEEDINGS.

The Secretary also invokes a common law right, independent of specific statutory authority, of the federal government to recover funds illegally paid as an additional source for his authority to order refunds of misspent pre-1978 Title I funds after administrative proceedings.

The Court below did not determine whether such a right existed because, the Court reasoned, even if it did it was not available to support the Secretary's action in this case. The Court correctly held that the Secretary had no such right in this case because such a right may only be exercised through an action in a court of competent jurisdiction and not through administrative proceedings. 662 F.2d at 216-18.

To affirm the judgment of the Third Circuit, this Court need only agree with the Third Circuit's ruling that whatever common law right of recoupment the Secretary has must be exercised through an action in court. Because the Secretary has not filed such an action, the broader question whether he has such a right in that context is not at issue. *See* 662 F.2d at 219 (Higginbotham, J., concurring).

The Secretary has no common law right to recoup misspent pre-1978 Title I funds through administrative proceedings. In *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329 (5th Cir. 1975), *cert.*

denied, 425 U.S. 935 (1976), the principal case on which the Secretary relied below, the Fifth Circuit only found such a right to exist because Congress had recognized that right and made specific reference to recoupment as a remedy in the statute involved. As the Court explained: "We think that Congress' intent when it enacted the Medicare Act in 1965 was not to limit the common law right. Provisions [in the Act] . . . show that Congress' understanding in 1972 when it amended the law was that the common law right was intact and expected to be utilized. . . . " 517 F.2d at 338.

In contrast to the Medicare statute, the pre-1978 version of Title I did not contemplate any common law right of recoupment on the Secretary's part. It provided a comprehensive remedial scheme, including withholding of funds and disapproval of applications, without reference to or need for a power of recoupment. *See* 20 U.S.C. §§ 241f, 241j (1974) (current version at 20 U.S.C. §§ 2832, 2836 [Supp. 1982]).

By providing that remedial scheme, Congress abrogated whatever common law causes of action the Secretary may have had to redress noncompliance with Title I. It is well established that where a legislative body provides for liability coupled with a special statutory remedy such as that contained in Title I, "that remedy, and that alone, must be employed." *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874). *See also National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy . . . , courts should not expand the coverage of the statute to subsume other remedies."); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.").

Where Congress has expressly established a scheme of remedial sanctions courts have refused to infer additional sanctions, particularly where, as here, such sanctions would undermine the principle of Federalism. In *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), for example, the Second Circuit refused to require New York State to correct the misspending of federal welfare funds by making retroactive payments to welfare recipients who had been underpaid by the State because "the only remedy [Congress] expressly contemplated was a prospective cut-off of [Federal] funds." *Id.* at 235. The Court explained:

> Congress has given no indication that it deems retroactive payments necessary to protect its interest, since the only remedy it expressly contemplated was a prospective cut-off of funds.
>
> Moreover, we cannot ignore the realities of the situation. The funds which were misspent are, as a practical matter, irretrievable. It would be unthinkable to order welfare recipients who received federal money under an illegal state program to return their checks. The reality is that the only means of redressing the harm to the federal treasury is to order the offending state to achieve *ex post facto* compliance through additional expenditure of *its* funds.
>
> That reality, however, invokes significant countervailing policies, namely, those behind the scheme of cooperative federalism alluded to earlier. Congress was clearly sensitive to the potential for serious strain in the federal structure inherent in a grant program of great magnitude and complexity. . . . Absent *explicit* directions from Congress to the contrary, we do not think that the federal interest in retroactively correcting the misuse of federal funds — the only federal policy applicable to this case — can by itself justify the significant increase in federal-state tensions which would result from a court order requiring the state to expend its funds against its will.

Id. (emphasis supplied).

The Secretary cites the Federal Claims Collection Act, 31 U.S.C. §§ 951-953 (1976), as "evidence of congressional belief in the existence of" the government's common law right of recoupment (Sec. Br. 24). The Amici concede that such a right exists; what is at issue is whether that right is available to support the Secretary's action in this case in the context of the Title I statute. The Secretary asserts that it is and the Third Circuit held and the Amici contend that it is not. The Federal Claims Collection Act adds nothing to the resolution of that dispute.

If Congress had not abrogated the Secretary's common law right of recoupment with the enactment of Title I's pre-1978 enforcement scheme, why did it in 1978 enact a specific statutory provision, Section 185, authorizing the recoupment remedy? If the Secretary already possessed such a remedy under the common law, Congress' addition of Section 185 to Title I was an act of complete redundancy. As Justice Douglas, writing for this Court in *Singer v. United States*, 323 U.S. 338, 344 (1945), explained, such an act cannot be attributed to Congress without "a clear legislative purpose" that would be served by that act. The Amici submit that no such purpose exists here.

Whatever common law right to recoupment the Secretary possesses must be exercised in a court of competent jurisdiction. Only then can the States be assured of the right to press their arguments concerning the merits of the audit in a judicial forum and the opportunity to have the facts supporting the refund claim evaluated in accordance with the rules of evidence and procedure.

CONCLUSION

The judgment of the Third Circuit should be affirmed because it is a correct application of the rule and reasoning

of *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) and other controlling legal principles.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,
v.
STATE OF NEW JERSEY

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNTIES; NATIONAL LEAGUE OF CITIES; UNITED STATES CONFERENCE OF MAYORS; AMERICAN PUBLIC WELFARE ASSOCIATION; NATIONAL COUNCIL OF LOCAL PUBLIC WELFARE ADMINISTRATORS; CITY OF STOCKTON, CALIFORNIA; CITY AND COUNTY OF LOS ANGELES, CALIFORNIA; COUNTY OF ONSLOW, NORTH CAROLINA; CITY OF PORTLAND, OREGON; CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA; CITY OF BOSTON, MASSACHUSETTS; BROWARD EMPLOYMENT AND TRAINING ADMINISTRATION; STATE OF MAINE; STATE OF NORTH CAROLINA; CITY OF SEATTLE, WASHINGTON; ALAMEDA COUNTY TRAINING AND EMPLOYMENT BOARD, CITY OF SAN JOSE, CALIFORNIA; STATE OF VERMONT; COUNTY OF CUMBERLAND, NORTH CAROLINA; CITY OF MEMPHIS, TENNESSEE; CITY OF DETROIT, MICHIGAN; CITY OF BRIDGEPORT, CONNECTICUT; CITY OF CAMDEN, NEW JERSEY; TOLEDO AREA CETA CONSORTIUM, OHIO; STATE OF OHIO; AND GENESEE-LAPEER-SHIAWASSEE-FLINT, MICHIGAN, CONSORTIUM

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Service v. *Dulles*, 354 U.S. 363 (1957) 24, 29
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S. Rep. No. 146, 89th Cong., 1st Sess. *reprinted in* [1965] U.S. Code & Cong. & Ad. News p. 1450.. 21
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U.S. Department of Labor, Semiannual Report of the Inspector General, October 1, 1981-March 31, 1981 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2125

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,
v.
STATE OF NEW JERSEY

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR *AMICI CURIAE*

INTRODUCTORY STATEMENT

This case raises an issue of great significance to all state and local governments that participate in joint programs with the federal government. The Department of Education (the "Department"), the federal partner in the elementary and secondary education assistance program, seeks to require its state partners to repay, dollar-for-dollar, funds found to have been misspent by the non-federal partners many years ago. The Department seeks to impose this retroactive repayment sanction regardless of the gravity of the state partners' mistakes and despite the federal government's failure to warn prospective grant recipients that they, and not the federal government, would bear sole responsibility for mistakes and would be subject to retroactive fiscal sanctions. It is obvious from the government's brief that if it prevails

here, it will seek to apply this notion to numerous other grant programs without regard to statutory language or the history of the program.

The government has seriously misconceived the nature of this case. Throughout its brief, it suggests that all grantees subject to audit disallowances are guilty of intentionally diverting federal funds to their own purposes or, at best, of misconduct by which they would be unjustly enriched if allowed to retain misspent funds. The government's gross mischaracterization leads it to conclude that it is not unfair to recoup misspent funds from such grantees, and indeed that justice compels recoupment.

This case, however, like most cases, does not involve bad conduct. Rather, it involves two state governments that, in discharging in good faith their responsibilities to implement and administer a large, complex federal program under an intricate set of rules and regulations, allegedly made mistakes. The states did not divert federal monies to their own purposes. They did not use the funds they received to save state funds they otherwise would have spent or to support other services that otherwise would have been financed by state funds. Like most state and local grant recipients, they simply expended the grant funds they received for activities that, at the time, both they and federal officials believed served the objectives of the Congress. The funds are gone. Now, many years later, the federal government seeks return of a portion of those funds because its auditors concluded that the states had not spent the funds precisely as intended. Such an action only serves to punish the grant recipient while absolving the federal partner of all responsibility for mistakes made in carrying out the program and while enhancing the federal treasury. If the states were required to repay disallowed costs, the intended beneficiaries of the grant would not benefit. The only beneficiary would be the federal fisc at the expense of the taxpayers of the two states.

There is no doubt that the illegal or fraudulent use of grant funds may be redressed under the criminal laws. Moreover, Congress clearly has the power to redress the knowing misuse of funds and a federal agency has the power closely to supervise the expenditure of funds it disburses to grantees. We do not challenge Congress' power to redress good faith mistakes made by grantees when implementing complex federal programs by authorizing federal agencies to impose such sanctions. We proffer but one basic principle: The federal government cannot require a state or local government grantee to repay federal grant monies from non-federal sources where as here the grantee was found to have misspent funds in a good faith effort to implement the grant, unless the federal government has given advance notice—by statute and regulations—to all prospective grantees of its intention to require such repayment.

Congress did not give state and local governments such advance notice under the Elementary and Secondary Education Act ("ESEA"). Absent such authorization a federal agency cannot require repayment from non-federal sources. Similarly, the Department did not give advance notice that repayment from non-grant sources would be required by promulgating regulations. Assuming *arguendo* that an agency may validly provide by regulation that grantees found to have misspent funds will be required to repay such funds from non-grant sources in the absence of statutory authority, a point we do not concede, the Department did not attempt to do so here.

Like ESEA, the Comprehensive Employment and Training Act ("CETA") of 1973, in which most Amici participated, did not include repayment among the noncompliance sanctions available to the Department of Labor. In 1978, Congress amended both ESEA and CETA to provide for such a repayment sanction. In neither case may the administrative agencies apply these provisions retroactively to disallowed grant funds received prior to the 1978 amendments. Moreover, the Depart-

ment of Labor, like the Department of Education, failed to provide for such a repayment sanction in its regulations. Therefore, state and local governments that received CETA funds prior to the effective date of the 1978 Amendments, like their counterparts under ESEA, may not now be required to repay those funds out of non-grant monies.

The principle that a federal agency may not impose a fiscal sanction without Congressional authorization does not mean that state and local governments may disregard federal requirements with impunity when expending federal grant funds. The federal government must, however, explicitly and unambiguously inform state and local governments of the consequences of their failure to conform fully to federal requirements. The federal government may not claim, *post hoc*, that authority to impose fiscal sanctions can be implied *sub silentio*.

Congress carefully chooses the types of sanctions that it determines are appropriate for a particular program. In the case of both ESEA and CETA, Congress initially authorized the imposition of only certain limited sanctions, from which repayment was omitted. Neither agency sought to implement a repayment sanction by regulation. Congress later expanded the authority of both agencies to include the repayment sanctions urged here. Subsequently, Congress cut back on that authority when enacting block grant legislation in 1981 and 1982. All that can be deduced from the Congressional omission of a repayment sanction in the original ESEA and CETA legislation is a decision not to authorize the imposition of fiscal repayment sanctions. Where Congress has not included a repayment sanction among the sanctions it authorizes an agency to impose on its state and local government partners, the agency cannot impose such a sanction outside the authority granted it. Moreover, any authority that was granted and later revoked cannot be applied retroactively.

INTEREST OF *AMICI CURIAE*

This case has potential significance for every state and local government that has received federal grants over the last decade. While there are differences in the statutes authorizing these programs that may bear on the government's power to impose fiscal sanctions of the sort urged here, there is no doubt that the government seeks to establish a rule that it would apply to all grant programs. At present, many millions of dollars currently are in dispute at various stages of audit and disallowance proceedings under the Comprehensive Employment and Training Act ("CETA") program alone.[1] In those proceedings state and local government participants in CETA ("prime sponsors") maintain or may maintain that the Department of Labor does not have the authority to request repayment of allegedly misspent CETA funds disbursed prior to the implementation of the 1978 CETA Amendments from non-grant sources.

Each of the Amici are or were prime sponsors, served as prime sponsors within consortia of city, county, or state sponsored CETA programs, or represent the interest of local and state governmental agencies whose resources will be further drained if required to repay allegedly misspent CETA funds from non-CETA sources.

1. *The National Association of Counties (NACO)*: This membership organization represents the interests of approximately 2,100 counties throughout the United States. Counties, directly and through their membership in consortia, constitute over seventy percent of the over 475 CETA prime sponsors nationwide.

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[1] Based on reports issued by the Department of Labor, it appears that audit resolution activity for the last two semiannual periods alone totalled disallowed costs for state and local prime sponsors of some $62 million. Other grantees and subgrantees were disallowed some additional $39 million. *See*, U.S. Department of Labor, Semiannual Report of the Inspector General, April 1, 1981—September 30, 1981, Appendix at 114 and U.S. Department of Labor, Semiannual Report of the Inspector General, October 1, 1981—March 31, 1981, Appendix at 78-79.

2. *The National League of Cities (NLC)*: This non-profit membership organization assists municipalities in performing their functions. Its membership includes direct member cities, state leagues of municipalities and state league member cities, many of which have served as prime sponsors under CETA. In all, almost 15,000 cities and municipalities are members of and participate in the actvities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities."

3. *The United States Conference of Mayors*: The Conference is an organization of city governments represented through their chief elected officials, Mayors. The Conference was organized to promote the causes of cities and to foster responsible and effective relationships between city halls and the federal government. The Conference represents cities of over 30,000 in population, including virtually all cities of over 100,000, most of which have served as prime sponsors under CETA. The Conference operates a clearinghouse on a fee basis for over 120 prime sponsors and has been involved actively in the development and review of CETA statutes and regulations.

4. *American Public Welfare Association (APWA)*: This non-profit membership organization is concerned with the effective administration and delivery of all human service programs. Members include virtually all state and territorial public agencies, more than 1,200 local governments and non-profit agencies, and some 6,500 individuals. The APWA has a vital interest in the federal-state-local partnership for sound and effective administration of human service programs, including CETA.

5. *National Council of Local Public Welfare Administrators*: This affiliate of the APWA represents approximately 150 administrators of local public welfare programs. Although many county welfare departments do not directly sponsor CETA programs, they have a vital interest in maintaining the integrity of employment programs.

6. *City of Stockton, California*: The City participates in the Stockton/San Joaquin Consortium, a CETA prime sponsor. The City is presently challenging the disallowance of hundreds of thousands of dollars before the Department of Labor, in part for periods prior to implementation of the 1978 CETA Amendments.

7. *The County of Los Angeles, California*: The County participates in a consortium which serves as a CETA prime sponsor. It is challenging the disallowance of millions of dollars, in part for CETA funds disbursed for periods prior to implementation of the 1978 Amendments.

8. *City of Los Angeles, California*: The City of Los Angeles has served as a CETA prime sponsor and is subject to audit disallowances of some $180,000 for periods prior to the 1978 CETA Amendments.

9. *County of Onslow, North Carolina*: Onslow County served as a CETA prime sponsor for the years 1974-78. It is presently challenging hundreds of thousands of dollars proposed for disallowance.

10. *City of Portland, Oregon*: The City of Portland's Training and Employment Division serves as a CETA prime sponsor. The City is presently challenging the disallowance of approximately $1 million, most of which is for periods prior to implementation of the 1978 CETA Amendments.

11. *City and County of San Francisco, California*: The City and County serves as a CETA prime sponsor and is challenging an audit finding that it earned and is required to refund over $200,000 in interest on CETA funds held prior to disbursement for program purposes, in part for periods prior to implementation of the 1978 Amendments.

12. *City of Boston, Massachusetts*: The City of Boston has served as a prime sponsor for CETA grant programs since 1973. The City is presently challenging the disallowance of approximately $1.6 million, all for periods

prior to the implementation of the 1978 CETA Amendments.

13. *The Broward Employment and Training Administration (BETA)*: This consortium serves as a prime sponsor for Broward County, Florida, and the Cities of Ft. Lauderdale and Hollywood, Florida. It is presently challenging the disallowance of millions of dollars, in part for CETA funds disbursed for the periods prior to implementation of the 1978 Amendments.

14. *State of Maine by its Attorney General*: The State of Maine, through the Office of Maine CETA, has served as a CETA prime sponsor since CETA's inception. It is presently challenging the disallowance of several hundred thousand dollars of funds received and disbursed prior to the implementaton of the 1978 CETA Amendments.

15. *State of North Carolina*: The State serves as a CETA "balance of state" prime sponsor. The State is presently challenging the disallowance of approximately $100,000 in the Court of Appeals for the Fourth Circuit, all of which is for periods prior to the implementation of the 1978 CETA Amendments.

16. *City of Seattle, Washington*: The City is part of the Employment and Training Consortium which is the CETA prime sponsor for the Seattle/King County area. The Consortium is challenging questioned costs of hundreds of thousands of dollars, all of which is for periods prior to implementation of the 1978 CETA Amendments.

17. *Alameda County Training and Employment Board*: The Board is a consortium prime sponsor consisting of 13 local governments, one of which is the County of Alameda, California. The rest include the cities of Alameda County, with the exception of Oakland and Berkeley. The Board is engaged in administrative proceedings involving several hundred thousand dollars.

18. *City of San Jose, California*: The City served with the County of Santa Clara as a CETA prime spon-

sor until late 1980. The City is challenging the disallowances of millions of dollars, a large part for the period prior to implementation of the 1978 Amendments.

19. *State of Vermont*: The State serves as a CETA "balance of state" prime sponsor. The State is challenging thousands of dollars of disallowed costs, most for periods prior to implementation of the 1978 Amendments.

20. *County of Cumberland, North Carolina*: Cumberland was a prime sponsor during the period prior to implementation of the 1978 Amendments and is currently contesting some $100,000 of proposed disallowances.

21. *City of Memphis, Tennessee*: As other prime sponsors, the City of Memphis is facing challenges to pre-1978 expenditures under the CETA program.

22. *City of Detroit, Michigan*: The City of Detroit is a prime sponsor of CETA grant programs; it has received audit exceptions from the Department of Labor for an amount in excess of $8,000,000.

23. *City of Bridgeport, Connecticut*: The City of Bridgeport has served as a prime sponsor for CETA grant programs since the inception of the CETA program. The City is facing audit exceptions for more than $500,000 for the period prior to Fiscal Year 1978.

24. *City of Camden, New Jersey*: The City of Camden has been a prime sponsor since 1973. The City is concerned about the drain on local general revenues that a use of a recoupment procedure would have.

25. *Toledo Area CETA Consortium*: This Consortium is the CETA prime sponsor for Lucas and Wood Counties and the City of Toledo, Ohio. Repayment of approximately $3,000 for audit exceptions for pre-1978 efforts has been made by the Consortium from the general revenue funds of the City of Toledo.

26. *State of Ohio*: The Office of Manpower Development of the Ohio Bureau of Employment Services serves as CETA Balance of State Prime Sponsor for the

State of Ohio. The Office of Special Grants of the Ohio Bureau of Employment Services administered CETA Special Grants to Governors. Audits of both agencies have questioned or are anticipated to question between $150 million and $200 million under grants issued prior to the 1978 CETA Amendments.

27. *Genessee-Lapeer-Shiawassee-Flint (GLSF) Employment and Training Consortium*: The GLSF Consortium was founded in 1974 at the time that CETA grants were first implemented. The Consortium includes three counties and one city in the state of Michigan. The Consortium is facing thousands of dollars in disallowed costs for the period prior to 1978.

SUMMARY OF ARGUMENT

Amici submit that the government's position is flawed for the following reasons:

First, the pre-1978 Education Act, in place at the time of the alleged misspending, prescribed certain remedies and sanctions but the one employed here—retroactive imposition of fiscal sanctions—was not among them. The Department's regulations failed to set forth the sanction sought here. Both the statute and regulations serve as a bar to creation and imposition of different and unprescribed remedies.

Second, the 1978 Education Amendments *did not* authorize imposition of retroactive fiscal sanctions. Far from conferring the power to read those sanctions into the pre-1978 statute, the new provision confirms that this power was not in place at an earlier time. The 1978 Amendments were not made retroactive. Further, the statute cannot be given retroactive effect in view of the Department's regulations. Retroactive application would trample upon the well-established administrative law principle that affected parties are entitled to rely upon regulations in place at the time requested activity takes place. Moreover, under the Administrative Procedure Act

even the prospective application of the 1978 Amendments is improper unless properly implemented by regulation.

Third, retroactive sanctions, if unauthorized by statute and regulations, cannot be founded on the common law. The statute deals with the matter of sanctions; Congress could not have intended *sub silentio* to invest the Department with other unspecified sanction powers and the Department's regulations block the arrogation to the Department of any common law powers. In any case, the present proceeding is not a common law recoupment action but a review of an administrative decision to consider the legality of sanctions imposed "under" the statutory sanction provisions of the Act.

ARGUMENT

I. THE DEPARTMENT OF EDUCATION DID NOT HAVE AUTHORITY TO REQUIRE REPAYMENT OF MISSPENT TITLE I FUNDS FROM NON-GRANT SOURCES DURING THE YEARS AT ISSUE.

Prior to 1978, the Act provided no legal basis for the action taken by the Department in this case. The Act contained no express authority that would permit the Department to require repayment of misspent Title I funds from non-grant sources nor did Congress intend to give the Department such authority. Moreover, such authority cannot be implied. Finally, even if the Act contained such authority, explicitly or implicitly, the Secretary cannot exercise that authority because he failed to implement it by promulgating regulations as required by the Administrative Procedure Act, 5 U.S.C. § 553. The first two of these points is discussed below; the last point is discussed in Section III, *infra*.

A. Prior to 1978, the Act did not authorize a repayment sanction.

Prior to 1978, the Secretary's only authority under the Act to impose fiscal sanctions on state education agencies ("SEAs") found to have misspent Title I education funds

was set forth in Section 146 of the Act, 20 U.S.C. § 241j; (1974) (repealed by 20 U.S.C. § 2836 (Supp. 1982), Pub. L. No. 95-561, Title 1, § 101(c), Nov. 1, 1978, 92 Stat. 2200.) That section authorized the Secretary to *discontinue* further payments to any state education agency he found had failed "to comply substantially with any assurance set forth in the application of the state approved" by the Secretary, but only until the state cured its noncompliance.[2] Nowhere in Section 146 or elsewhere did the pre-1978 Act authorize the Secretary to require a state to *repay* amounts found to have been misspent out of non-grant funds.

B. Authority for a repayment sanction cannot be read into the Act *sub silentio*.

The Department has argued that it has inherent authority to recover misspent funds from non-grant sources. (U.S. Br. at 15-23) The Department's argument fails for several reasons.

First, as a matter of law, the authority to require repayment of misspent grant funds from non-grant sources cannot be implied. As this Court in *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981) explained:

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' [in return for federal funds]. . . .
>
> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

(Footnote and citations omitted.)

Indeed, where Congress has chosen to authorize certain sanctions expressly, the courts have been reluctant to infer additional powers, particularly when the use of such

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[2] The statute arguably required disbursement of withheld funds once the noncompliance was cured.

powers might undermine the spirit of cooperative federalism that underlies programs such as Title I of the Education Act. Thus, in *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), the court refused to require a state to make retroactive payments to welfare recipients who had been underpaid by the state in part because "the only remedy [Congress] expressly contemplated was a prospective cut-off of funds." As the court explained:

> Congress has given no indication that it deems retroactive payments necessary to protect its interest, since the only remedy it expressly contemplated was a prospective cut-off of funds.
>
> Moreover, we cannot ignore the realities of the situation. The funds which were misspent are, as a practical matter, irretrievable. It would be unthinkable to order welfare recipients who received federal money under an illegal state program to return their checks. The reality is that the only means of redressing the harm to the federal treasury is to order the offending state to achieve *ex post facto* compliance through additional expenditure of its funds.
>
> That reality, however, invokes significant countervailing policies, namely, those behind the scheme of cooperative federalism alluded to earlier. Congress was clearly sensitive to the potential for serious strain in the federal structure inherent in a grant program of great magnitude and complexity. . . . Absent *explicit* directions from Congress to the contrary, we do not think that the federal interest in retroactively correcting the misuse of federal funds —the only federal policy applicable to this case—can by itself justify the significant increase in federal-state tensions which would result from a court order requiring the state to expend its funds against its will.

Id. at 235 (emphasis added).

Similarly, in *Wisconsin Department of Health and Social Services* v. *United States*, No. 80-C-234 (W.D. Wisc.

August 4, 1982), a decision the United States has decided not to appeal, the court ruled that where the Foods Stamps Act, 7 U.S.C. § 2011 *et seq.*, set forth some sanctions and the circumstances under which they could be imposed, authority for other sanctions could not be implied. *Id.*, slip op. at 9-10. Thus, where, as here, Congress authorized certain sanctions but failed to authorize the Secretary even in ambiguous terms, to require repayment of misspent funds, that power cannot be implied. *Pollard* v. *Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874). *See also, National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy . . . , courts should not expand the coverage of the statute to subsume other remedies.")

Second, the Department ignores the fact that the pre-1978 Act specifically addressed the actions the Secretary could take in the event that he determined that Title I funds were not being spent substantially in accordance with the purpose or the provisions of the Act. It only authorized him to *discontinue* further payments until the noncompliance was cured. It did not authorize the Secretary to require *repayment of expended funds.* 20 U.S.C. § 241j.

In enacting the 1978 Amendments with specific authority to impose a repayment sanction, 20 U.S.C. § 2835, Pub. L. No. 95-561, 92 Stat. 2191, Congress did not, as the Department argues (U.S. Br. at 36), approve of authority it assumed the Department always had. Rather, Congress simply gave the Secretary authority he previously lacked. *Wisconsin Department of Health and Social Services* v. *United States, supra*, slip op. at 10. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 (1969), relied upon by the Department (U.S. Br. at 36) is inapposite here. There, Congress, in explicit language, made clear that a statutory exception subsequently

adopted left intact the agency's construction of other provisions of the statute.

Finally, the government ignores the fact that Congress, when it chooses to do so, tailors the fiscal sanctions it authorizes to its particular program objectives. As we have noted, Congress originally authorized the Secretary only to withhold funds from states found to have misspent Title I education funds. 20 U.S.C. § 241j.[3] In 1978, it augmented the Secretary's authority to permit him to require repayment of misspent funds from non-federal sources. In 1981, Congress reversed its 1978 action, once again limiting the Secretary's remedies to the temporary discontinuance of payments and withholding of funds. 20 U.S.C. §§ 3803, 3872 (1982 Supp.). It is not surprising that Congress cut back the Secretary's authority in 1981 as part of its effort to "free the schools of unnecessary Federal supervision, direction, and control."

The history of the Comprehensive Employment and Training Act reveals a similar pattern. The original Act authorized the Secretary of Labor to discontinue "any further payments to [a] prime sponsor . . . [and to] notify such sponsor to return to him all or part of the *unexpended* sums paid under this chapter during the fiscal year" if, *inter alia*, the Secretary determines that the prime sponsor has failed "to carry out the purposes and provisions of this Act." Section 108(d), 87 Stat. 848 (emphasis added.) The Act also authorized the Secretary to "withhold funds otherwise payable under this chapter, but only in order to recover any amounts expended in the current or immediately prior fiscal year in violation of any provision of this chapter or any term or condition of assistance under this chapter." Section 602(b), 87 Stat. 878. Nowhere in Section 100(d), Section 602(b) or

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[3] The Secretary was also authorized to disapprove an application for funds where he was not satisfied that the state would satisfy the requirements of the Act. 20 U.S.C. § 241f.

elsewhere does the 1973 CETA Act authorize the Secretary of Labor to require a prime sponsor to repay amounts found to have been misspent out of non-CETA funds. Indeed, even the authority to withhold future funds from a prime sponsor is limited to "amounts expended in the current or immediately prior fiscal year."

In 1978, Congress recognized that the Secretary of Labor lacked authority to require repayment of misspent CETA funds when it amended the CETA Act to give the Secretary additional authority to impose fiscal sanctions on prime sponsors found to have misspent CETA funds. Section 816(d)(1) of the amended Act provides:

> [T]he Secretary shall have authority to terminate or suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, *including the repayment of misspent funds from sources other than funds under this chapter* and the withholding of future funding.

29 U.S.C. § 818(d)(1) (1978) (emphasis added). The fact that Congress enacted this provision some four years after CETA had been in effect clearly indicates that Congress recognized that it had not, under the terms of the 1973 Act, authorized the Department of Labor to seek repayment of misspent funds from non-CETA sources.

In 1982, Congress revamped the CETA program and enacted the Jobs Training Partnership Act. Pub. L. No. 97-300, 96 Stat. 1322 (1982). Under the new provisions, the Secretary of Labor is authorized only to offset disallowed costs against other amounts due a recipient under the Act unless it is determined that "the misexpenditure of funds was due to willful disregard of the requirements of this Act, gross negligence, or failure to observe accepted standards of administration." Only in the latter case, is the Secretary authorized to require repayment from funds other than those received under the Act. Pub. L. No. 97-300, § 164(d) and (e), 29 U.S.C. § 1574(d) and (e).

Similar patterns exist in other grant programs. For example, under the Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, the Secretary of DHEW was authorized to either terminate payments or to reduce the amount payable to a state by three percent for each instance of noncompliance under Title XX. Section 2003(e)(2). Title XX was amended in 1981 to provide "[e]ach state shall repay to the United States amounts ultimately found not to have been expended in accordance with this title, or the Secretary may offset such amounts against any other amount to which the State is or may become entitled under this title." § 2006(b), 95 Stat. 867, 42 U.S.C. § 1397e(b).

The State and Local Fiscal Assistance Act of 1972 authorized the Secretary of the Treasury, upon learning of an instance of discrimination, to so inform the state and if, after a reasonable period of time, the state failed to correct the situation, refer the matter to the Attorney General or take action under Title VI of the Civil Rights Act of 1964. Pub. L. No. 92-512, § 122(b), 86 Stat. 932. The Attorney General was authorized to bring a civil action in district court. § 122(c). The provision was amended to give the Secretary the authority, upon a determination of noncompliance, to suspend payments, 31 U.S.C. § 1242(b)(3)(C), or to terminate payments, 31 U.S.C. § 1242(b)(3)(D). The State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, § 8(a), 90 Stat. 2350. These examples demonstrate that Congress was fully aware of the remedies available to it when both ESEA and CETA were enacted and that it selects only those sanctions it concludes are appropriate in a given context.

Congress also tailors sanctions authority to reflect the nature and gravity of erroneous expenditures by state and local governments. For instance, in the Welfare, Medicaid and Food Stamp areas, Congress from time to time has considered the imposition of repayment sanctions for erroneous payments made by sponsoring gov-

ernmental units. In considering such action, it has always been recognized that: (1) some errors in programs of this magnitude are inevitable; (2) a "zero-tolerance" (*i.e.*, total liability for *all errors*) is draconian and ultimately cost inefficient; (3) some leeway or "tolerance level" must be afforded to the administering governmental units; (4) sanctions should not be imposed without a "phase-in" period; and (5) if sanctions are to be used, an administrative machinery should be designed which offers the prospect of avoiding sanctions where the administering governmental unit could indicate that circumstances made "target levels" unattainable on any reasonable basis. *See, e.g.*, 7 U.S.C. § 2025 (1982 Supp.) (Food Stamps); 42 U.S.C. § 603(j) (1982 Supp.) (AFDC); *see also*, H. Rep. No. 95-345, 95th Cong., 2d Sess. *reprinted in* [1977] U.S. Code Cong. and Admin. News, p. 1704, 2289-2294.

The import of the sanctions provisions in these various programs is clear: authority to impose a particular sanction, especially the most drastic sanction possible, cannot be read into a statute governing an intergovernmental grant program.

II. THE 1978 ACT CANNOT BE RETROACTIVELY APPLIED.

In 1978, Congress recognized that the Secretary lacked authority to require repayment of misspent Title I funds when it amended the Act to give the Secretary authority to impose fiscal sanctions on SEAs found to have misspent Title I funds. Section 185(b) of the amended Act provides:

> Where, . . . the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of [such] funds . . . Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government.

20 U.S.C. § 2835(b) (1982 Supp.) The fact that Congress enacted this provision many years after the Act had been in effect clearly indicates that Congress recognized that it had not, under the terms of the pre-1978 Act, authorized the Department to seek repayment of misspent funds.

While the provision quoted above authorizes the Department to seek repayment of misspent funds disbursed after its enactment and implementation by regulation, it certainly cannot be given retroactive application to require repayment of funds disbursed and expended prior to the 1978 Amendments. New conditions and sanctions in a federal grant program should not be given retroactive application absent a clear Congressional intent to do so, as the Third Circuit concluded below. Relying on the principle set forth in *Pennhurst State School* v. *Halderman*, *supra*, "that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant," the court of appeals held that the statutory authority to require repayment of misspent funds could not be given retroactive effect to funds disbursed before the statute was enacted. (Pet. App. 14a)

As in *Rothstein*, the court below concluded that the retroactive application of a sanction such as asserted here would seriously undermine the spirit of cooperative federalism on which federal grant programs such as Title I of the Education Act are based and might discourage state and local government participation in such programs. (Pet. App. 12a-14a) *See also Solomon* v. *Califano*, 464 F. Supp. 1203 (D. Md. 1979).

The Third Circuit's refusal to give retroactive application to the repayment sanction at issue follows a well-established rule. As this Court stated in *Greene* v. *United States*, 376 U.S. 149, 160 (1964), "retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature,'" quoting *Union Pacific R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *see*

also Addisson v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). This Court recently reaffirmed "[t]he principle that statutes operate only prospectively [as distinguished from] judicial decisions [which] operate retrospectively." *United States* v. *Security Industrial Bank*, 51 U.S.L.W. 4007, 4009-10 (No. 81-184, 1982).

The Department seeks to avoid this basic principle by relying on *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974). (U.S. Br. at 38) While *Bradley* and the cases that follow it enunciate the general principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary," *id.* at 711, this principle has little relevance to a federal grant program that defines the contract-like relationship between the federal government and a grantee, as stressed in both *Pennhurst* and the decision below.

More importantly, even if the principles of *Bradley* may be applied here, the repayment sanction should not be retroactively applied here because Congress did not intend to give it retroactive effect and because retroactive application would result in manifest injustice to New Jersey, Pennsylvania, and other grantees. In deciding whether retroactive application of a statute would result in manifest injustice, *Bradley* indicates that the following factors should be examined: the nature of the parties involved, the nature of their rights and the nature of the impact of the change in law upon those rights. *Bradley* v. *School Board of City of Richmond*, *supra*, 416 U.S. at 717. Examination of these factors in the present context compels the conclusion that retroactive application of the repayment sanction would be manifestly unjust.

Under Title I the federal government sought to involve state and local governments as partners in order "to meet the special education needs of educationally deprived children" in low-income areas across the country. Pub. L.

No. 874, Title II, § 205, *as added* by Pub. L. No. 89-10, Title I, § 2, 29 Stat. 27, 30 (1965) (*codified as amended* at 20 U.S.C. § 2734 (Supp. III 1979)). In doing so, Congress recognized the need to balance the federal government's objectives with traditional state and local control over education. *See* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1450. As the Court stressed in *Pennhurst*, a case decided after *Bradley*, a state or local government's voluntary and knowing acceptance of the terms of a federal grant depends upon Congress' unambiguous expression of the conditions imposed upon the grantee. *Pennhurst State School* v. *Halderman*, *supra*, 451 U.S. at 17.

All of the following factors bear on the fundamental unfairness of the harsh, many-years-after-the-fact sanctions urged here and in the CETA program:

1. At the time funds were received and spent by New Jersey and Pennsylvania, they, like all other grantee states, did not know that huge subsequent financial liabilities could be unleashed against them. Neither the statute nor the regulations said so. The states did not have to participate in the program and they would have wanted to weigh this potential liability in considering whether, and at what level, to participate.

2. The federal government was the lead partner in Title I programs and shares, or predominates, in any culpability for errors. It wrote the regulations and volumes of manuals, guides and instructions. Its agents were charged with responsibility to review the performance of SEAs and to correct erroneous actions in short order. Errors will be made in any program of this kind, but these are no more the fault of state and local governments than of the federal government, whose Congress created the program and whose agency supervised it. Yet the sanctions are all a one-way street; the states are to pay 100 cents for every misspent dollar. And the money is not to go to the intended beneficiaries but to the treasury of the federal partner in this operation.

3. The sanctions are wildly out of proportion to the alleged offenses. To take one example, many of the sanctions threatened in programs such as CETA relate to alleged errors in determining or documenting participant eligibility or in computing amounts of funds to be distributed in particular cases. Every social welfare program has errors of this kind. In considering the imposition of sanctions for such errors, however, Congress has recognized that it would cost more to attempt to eliminate all of the errors that inevitably occur in large, complex grant programs than the costs associated with those errors and that sanctions for such errors must be carefully tailored accordingly. Here, the Secretary, without statutory basis, has arrogated authority to himself that all errors must be punished, regardless of the cost of avoiding the errors.

4. The prospect that a state or local government may encounter difficulty in defeating sanctions even where federal supervising officials have expressly blessed, if not encouraged, adoption of the policies challenged, highlights the federal government's effort to shift the creative burden and the risks of mistakes to its state and local partners. Moreover, it makes the threshold legal question of controlling significance and the unfairness of reading this power into grant statutes even more pronounced.

5. Fundamental unfairness also stems from the timing of the imposition of sanctions. Had the federal government ascertained the errors at the time they were being made, the states could have taken corrective action without suffering any, or at the worst any significant, reduction in federal funds. The prospect of prompt corrective action lies at the heart of the scheme initially adopted by Congress and the refusal of Congress to provide any after-the-fact retroactive sanction powers in the pre-1978 Act. But the sanction power now asserted turns that scheme on its head. For the government is saying that it can impose sanctions now for errors committed as long

ago as 1970. There is nothing either state could have done to correct or limit the effect of any errors.

In *California* v. *Block*, 663 F.2d 955, 959 n.3 (9th Cir. 1981), the court concluded that it would be manifestly unjust to impose new sanctions permitting the collection of "money from erring state agencies" for acts that were performed prior to the enactment of stricter sanctions, relying on the principles of both *Pennhurst* and the decision reached below. The same conclusion should apply in this case. Having first secured the states' participation, it would be manifestly unjust for the federal government to retroactively apply a sanction that would require the states to draw on their limited fiscal resources to pay back misspent federal funds. No important federal policy would be furthered by such an action. It would not serve the purposes of the Title I program in any way; rather, it would only serve to enhance the federal treasury at the expense of the taxpayers of the two states. Accordingly, the fiscal sanctions contained in the 1978 Act should not be given retroactive application.

The Department's effort to apply the 1978 Act retroactively is further confounded by the Education Consolidation and Improvement Act of 1981, in which Congress continued the Title I program and specifically provided that the repayment sanction would no longer apply. 20 U.S.C. § 3803. Thus, Congress has returned to its pre-1978 approach by only authorizing the Secretary to discontinue payments and withhold future payments. *See* 28 U.S.C. § 3872, replacing 20 U.S.C. § 2836. By seeking to apply the provision in effect from 1978 to 1981, the Department suggests that it is free to choose that one version of the three statutory approaches Congress has adopted over the last ten years, and not that the Court must apply the provision in effect when the Court reaches its decision. But if *Bradley* has any bearing whatsoever here, it could only mean that the courts must recognize the fluidity of the law and follow the latest Congressional action. Surely the fact that Congress has changed its

approach twice demonstrates that the provision in effect at the time the states agreed to accept the funds is the one that should govern here. Only such an approach will ensure that state and local governments know what its federal government partner expects them to do.

III. THE DEPARTMENT'S REGULATIONS DO NOT AUTHORIZE IT TO IMPOSE A REPAYMENT SANCTION.

Even if the pre-1978 Act or the 1978 Amendments in terms authorized imposition of repayment sanctions under the current circumstances, the Department could not lawfully implement these sanctions under the terms of its regulations, for two related but independently dispositive reasons. First, the Department's regulations do not authorize imposition of the sanctions proposed in this case. Second, the Department cannot infer authority to create new sanction powers not prescribed in its regulations because that course is barred by the Administrative Procedure Act and well accepted principles of administrative law.

The Department's responsibility to follow its own regulations is beyond dispute. *See Service* v. *Dulles*, 354 U.S. 363, 372 (1957); *Rodway* v. *United States Department of Agriculture*, 168 U.S. App. D.C. 387, 514 F.2d 809, 814 (D.C. Cir. 1975); *Griffin* v. *Harris*, 571 F.2d 767, 772 (3d Cir. 1978); *United States* v. *Coleman*, 478 F.2d 1374, 1371 (9th Cir. 1973). At the relevant times, the regulations have dealt expressly with the topic of remedies for violations and have not set forth the sanctions that are sought here. The Administrative Procedure Act, 5 U.S.C. § 553, which applies here, 36 Fed. Reg. 2532 (1971), requires the adoption of formal rulemaking procedures, including notice, an opportunity to comment and *Federal Register* publication, prior to the adoption of agency regulations and the promulgation of a basis and purpose statement explaining significant provisions of the proposed regulations. There is no question

that when APA rulemaking procedures are applicable, action taken in derogation of them is void. *See e.g., Morton* v. *Ruiz*, 415 U.S. 199 (1974); *NLRB* v. *Wyman-Gordon*, 394 U.S. 759 (1969); *Texaco, Inc.* v. *FPC*, 412 F.2d 740 (3d Cir. 1969); *Kelly* v. *Department of Interior*, 339 F. Supp. 1095, 1102 (E.D. Cal. 1972).[4]

The Department thus confronted an obligation to set forth any claimed sanction powers in its regulations. There are twin reasons for that requirement. First, formal rulemaking procedures would help to assure a rational determination, on the basis of public rulemaking procedures and the record made therein, on the question of whether sanctions such as those here asserted advanced the purposes of the statute and constituted sound administrative implementation of it. For rulemaking procedures, if followed, could have satisfied the Department that use of the sanctions asserted here was undesirable. In any case, the sanctions could not be adopted until the Department had fully considered the necessity for such sanctions and had reached the opposite conclusion.

Second, if the Department had concluded that such powers were necessary, it would have been incumbent upon the Department explicitly to advise all who might be affected by the regulations of the full range of sanctions that could be imposed and the conditions under which each would be used. No state or local government was required to participate in the program; but all such governments considering that course were entitled to know, as a matter of equity as well as a matter of right under the legal authorities cited above, the financial risks that participation would entail. Only on that basis could they

[4] The cases stress not only the legal necessity of following rulemaking procedures, but the wisdom of doing so. The cases say that rulemaking procedures are "designed to assure fairness and mature consideration of rules of general application" and to "enable[] the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." Texaco, Inc. v. FPC, *supra*, at 744.

make responsible decisions. Having failed to promulgate regulations pursuant to either the pre-1978 Act or the 1978 Amendments which contain a repayment sanction, the Department is barred from imposing the sanction.

By not promulgating regulations implementing the sanctions power it claims to have had all along, the Department not only failed to resolve definitively the scope of its statutory powers but also to give any indication of the conditions under which it would impose retroactive fiscal sanctions. Thus, the Department simply assumed it had the power to require repayment of misspent funds and then applied it without considering the appropriateness of its use in particular cases. As this Court recently affirmed, however, an agency must provide compelling justification for the imposition of the most drastic sanction in its " 'arsenal of flexible enforcement powers.' " *Steadman* v. *SEC*, 451 U.S. 91, *rehearing denied*, 10 S. Ct. 2008 (1981), *aff'g.*, 603 F.2d 1126, 1139 (5th Cir. 1979). Moreover, Congress' expansion of the Department's sanctions authority in 1978 suggests that retroactive repayment sanctions ought not be automatically applied in all cases. Thus, the Department's failure to describe in advance the scope of its sanctions powers and the criteria that would govern the circumstances under which they would be exercised and its failure to justify the imposition of its most drastic remedy in this case violates both the *Steadman* test and Congressional intent.

IV. THE DEPARTMENT HAS NO POWER UNDER COMMON LAW TO SUSTAIN THIS SANCTION.

In urging that the common law and the Federal Claims Collection Act, 31 U.S.C. § 951 *et seq.* serve as independent bases for imposing sanctions apart from the statute (U.S. Br. at 24-31), the Department seriously misconceives and then misapplies this asserted source of authority. If the statute authorizes the imposition of these sanctions, the existence *vel non* of common law authority is irrelevant. But if the statute does *not* authorize imposition of sanctions of this sort, then the Department

begs the question in claiming authority under the common law and the Federal Claims Collection Act, for there exists no debt owing to the United States *to be enforced* under the common law.

The various flaws in the Department's analysis come down to these, each of which is independently dispositive of its common law contention:

1. The Department's analysis essentially rests on a line of cases which upheld the government's right to use the same common-law remedies available to a private person to enforce its contractual rights. (U.S. Br. at 15-16) But the precise question here is at what point and under what terms did Pennsylvania and New Jersey stand in the position of a party contractually indebted to the United States. They surely did not at the time federal funds were transmitted to them. Nor did some sort of debt obligation perforce arise when allegedly erroneous expenditures were made in the states' good faith efforts to administer these large and complex programs. That happens all the time, but a common law debt does not vest by virtue of that fact alone; none would participate if those were the rules.

Instead, the statute determines under what terms and when the actions of a state government can be analogized to a debt owing to the United States: it sets forth what activity is expected of states and just what sanctions may be employed by the United States. The point is that the common law provides measures to *enforce* some rights possessed by the United States; but something else must establish the right itself. Here the education statute does so, but not the one sought here.

2. Even if the education statute were viewed as something less than right-creating in the first instance, at the very least it undertakes to prescribe the full panoply of governmental remedies for alleged errors in implementing the program. This proceeding was commenced to impose sanctions under that statute. Under any accepted canon of statutory construction, the remedies section of

this statute would have to control in ascertaining the remedies possessed by this Department rather than some generalized and unarticulated "common law."

The withholding section has all of the earmarks of controlling force of law: it deals directly, expressly and thoroughly with the subject of remedies; it, rather than some notion of the common law, is used by the Department in implementing the statute; the statute, not the common law, is made known to all states; it was crafted relatively recently; and it, rather than the common law, served as the basis for promulgating the Department's regulations. It has been established for over a century that where a legislative body provides for liability coupled with a special statutory remedy, "that remedy, and that alone, must be employed." *Pollard* v. *Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874). *See also National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). Moreover, it comports with Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(b), which provides that no sanction may be imposed "except within jurisdiction delegated by the agency and as authorized by law."

The Department cannot escape the express list of statutory remedies by suggesting that the common law right of recovery survives the enactment of the Education Act. The pre-1978 Act and the 1978 Amendments provide for sanctions other than the repayment of past funding and, in any case, it requires more than the federal government's *post hoc* declaration to establish that a prescribed list of remedies means to embrace other but specified ones. If Congress intended that the Department have available to it all common law remedies, why did it not say so? Were the specified remedies mere surplusage in the pre-1978 Act? Why did the Congress feel constrained to add new powers in the 1978 Act if those were already available to the Department by virtue of common law without the amendment? And why did the Congress decide to return to the pre-1978 approach in 1981? These

questions suggest their own answer: the Department cannot advance its common law argument and leave in its wake any fair, or even plausible, meaning for the statute in its various forms.

3. The Department's own regulations bind it to employ only the sanctions and procedures prescribed in those regulations. *Service* v. *Dulles*, *supra*. The regulations incorporate the statute and rely *exclusively* upon the statutory sanction provisions. There is no mention of any authority claimed by the Department to impose sanctions in addition to those prescribed in the regulations or statutes but flowing instead from the "common law." Had the Department attempted in its regulations to arrogate to itself any common law powers, there would have been a substantial doubt as to the legality of such an effort, but there is no doubt that the Department has no such authority if it has not so much as undertaken to attempt to clothe itself with that authority in its regulations.

4. Whether or not the Department *could* set in motion a common law proceeding to impose retroactive sanctions, the present posture of the case indisputably is *not* that. A common law recoupment action would require initiation of a civil proceeding in a district court. This case simply involves an *administrative* disallowance proceeding regarding the Department's implementation of its asserted statutory sanction authority.

5. For reasons previously mentioned, the cases relied upon by the Department have nothing to do with ascertaining whether a debt exists in the first place. Its reliance on *West Virginia* v. *Secretary of Education*, 667 F.2d 417 (4th Cir. 1981), rests entirely on one sentence of unexplained dictum, which is overwhelmed by the thorough and thoughtful analysis of the same issue reaching the opposite conclusion in the decision below. *Mount Sinai Hospital of Greater Miami* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) is inapposite because that decision rests in large part upon the special nature of that funding mechanism and the

legislative history of the statute there administered by HHS.

Most of the cases on which the Department relies for its recoupment argument involve the government's right to set-off monies owed it against future payments or claims against it. *See, e.g., Collins* v. *Donovan*, 661 F.2d 705 (8th Cir. 1981) (overpayment recovered by withholding future payments); *Jacquet* v. *Westerfield*, 569 F.2d 1339 (5th Cir. 1978) (erroneous assistance payment recouped by withholding current assistance); *Mount Sinai Hospital* v. *Weinberger, supra* (recoupment achieved against future federal funds). The only case where the government sought repayment was *United States* v. *Wurts*, 303 U.S. 414 (1938), a case commenced in district court to recover an erroneous tax refund. None of the cases cited by the government support the contentions it *must* advance here: that an agency has power to impose retroactive sanctions against a governmental cosponsor of an advance-funded grant program in the face of a statute and regulations (a) authorizing other sanctions, but (b) not authorizing imposition of the sanctions attempted to be invoked under the umbrella of the common law.

CONCLUSION

Amici curiae respectfully submit that the judgment of the Court of Appeals should be affirmed.

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Dated: February 15, 1983

No. 81-2125-CFX
Status: GRANTED

Title: Terrel H. Bell, Secretary of Education, Petitioner
v.
New Jersey and Pennsylvania

Docketed:
May 17, 1982

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Burgess,Mary Ann, Hunting,Margaret

Entry	Date	Note	Proceedings and Orders
1	Mar 5 1982		Application for extension of time to file petition and order granting same until April 16, 1982 (Brennan, March 8, 1982).
2	Apr 6 1982		Application for further extension of time to file petition and order granting same until May 16, 1982 (Brennan, April 6, 1982).
3	May 17 1982	G	Petition for writ of certiorari filed.
5	May 28 1982		Order extending time to file response to petition until July 20, 1982.
6	Jun 21 1982		Brief amicus curiae of State of West Virginia filed.
7	Jul 16 1982		Order further extending time to file response to petition until July 28, 1982.
8	Jul 19 1982		Brief amicus curiae of State of Maryland filed.
9	Jul 22 1982		Brief of respondent Commonwealth of Pennsylvania in opposition filed.
10	Jul 28 1982		DISTRIBUTED. September 27, 1982
11	Jul 29 1982	X	Brief of respondent in opposition filed.
12	Oct 4 1982		Petition GRANTED.
			**********
14	Nov 22 1982		Order extending time to file brief of petitioner on the merits until December 18, 1982.
15	Dec 3 1982		Brief amicus curiae of Lawyers Comm. for Civil Rights filed.
16	Dec 17 1982		Joint appendix filed.
17	Dec 17 1982		Brief of petitioner Bell, Sec. of Education filed.
18	Jan 7 1983	G	Motion of respondents for divided argument filed.
20	Jan 5 1983		Order extending time to file brief of respondent on the merits until February 15, 1983.
22	Jan 5 1983		Also, motion of Solicitor General for additional time for oral argument.
23	Jan 17 1983		Motion of respondents for divided argument GRANTED. The request for additional time for oral argument is denied.
24	Jan 15 1983		Record filed.
25	Jan 15 1983		Certified appendices and partial proceedings received.
26	Jan 21 1983		Record filed.
27	Jan 21 1983		Lodging received.
28	Feb 17 1983		Brief of respondents State of New Jersey, et al. filed.
29	Feb 15 1983		Brief amicus curiae of States of Maryland, Delaware, et al. filed.
30	Feb 15 1983		Brief amicus curiae of Natl. Assn. of Counties, et al. filed.
31	Feb 15 1983		Order further extending time to file brief of respondent on the merits until February 18, 1983.

No. 81-2125-CFX

Entry	Date	Note	Proceedings and Orders
32	Feb 17 1983		Brief of respondent Commonwealth of Pennsylvania filed.
33	Feb 15 1983		Brief amicus curiae of College of the Sequoias, et al filed.
34	Mar 10 1983		CIRCULATED.
35	Mar 24 1983		SET FOR ARGUMENT. Monday, April 18, 1983. (2nd case) 1 hour
36	Apr 11 1983	X	Reply brief of petitioner filed.
37	Apr 18 1983		ARGUED.